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THE TRUSTEE ACTS:

CONTAINING

THE TRUSTEE ACT, 1850

THE TRUSTEE EXTENSION ACT, 1852

AND

THE TRUSTEE ACT, 1888.

WITH SUPPLEMENT

OF

THE LUNACY ACT, 1890 (53 Vict. c. 5),

(So far as relates to Vesting Orders).

BY

GAWAYNE BALDWIN HAMILTON,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW;

Author of "A Concise Treatise on the Law of Covenants."

LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers and Booksellers.

1890.

KN210HAM

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

PREFACE.

THERE are, probably, few Acts of Parliament to which there is more frequent occasion to refer than the Trustee Act, 1850, and the Trustee Extension Act, 1852; and now that the particular sections under which relief is sought have to be enumerated in the last paragraph of the petition, and sect. 30 of the Conveyancing Act, 1881, has ceased to apply to copyholds, reference to the Acts themselves has become even more necessary than formerly. It has, therefore, occurred to me that an edition of the Acts, dealing with them more fully than is possible in works treating of a large number of other statutes as well as the Trustee Acts, might prove useful to the Profession. As the Trustee Act, 1888, dealing with the liability of trustees, passed while this work was in the press, it has been thought convenient to include that also.

As the cases under many of the sections are numerous, I have endeavoured to give them sufficiently at length for it to be seen whether they are in point, so that loss of time by looking out

cases dealing with a different subject-matter to that under consideration may be avoided.

In the Table of Cases references are given to all the Reports. When a case cited was decided in the Court of Appeal, it is referred to as "Ch. Div.;" when in the Court below, as "Ch. D." The New Series of the Law Journal is referred to throughout as "L. J.;" the New Series of the Law Times and Jurist being distinguished by the letters "N. S."

The cases are cited up to and including the Law Reports for December, 1888, but Order LV. rule 13A, has been incorporated in the text.

Where a case is referred to under several sections, an asterisk (*) has been placed in the Table of Cases against the page at which it is given most fully.

G. B. H.

January, 1889.

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ERRATA.

Page 27, note to s. 17, line 2—*after* "copyhold" *add* "estate."

,, 122, line 15—*for* "mortgagee's valuer" *read* "mortgagor's valuer."

THE TRUSTEE ACTS.

THE TRUSTEE ACT, 1850.

13 & 14 Vict. c. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. [*5th August*, 1850.]

Whereas *an Act was passed in the first year of the reign of his late Majesty King William the Fourth, intituled An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain Cases: And whereas an Act was passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in trust: And whereas an Act was passed in the second year of the reign of her present Majesty, intituled An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees: And whereas it is expedient that the provisions of the said Acts should be consolidated and enlarged: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That all proceedings under the said Acts or any of them commenced before the passing of this Act may be proceeded with*

11 Geo. 4 & 1 Will. 4, c. 60.

4 & 5 Will. 4, c. 23.

1 & 2 Vict. c. 69.

under the said recited Acts, or according to the provisions of this Act, as shall be thought expedient, and, subject as aforesaid, that the said recited Acts shall be and the same are hereby repealed: Provided always, that the several Acts repealed by the said recited Acts shall not be revived, and that such repeal shall only be on and after this Act coming into operation.

This section was repealed by the Statute Law Revision Act, 1875,

Jurisdiction given to Court of Chancery by Act now transferred to Chancery Division.

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (2), the exclusive jurisdiction given to the Court of Chancery by this Act was transferred to the Chancery Division of the High Court of Justice.

By 17 & 18 Vict. c. 82, s. 11, this Act was extended to the County Palatine of Lancaster.

County Court.

Where an estate is under 500*l.* orders under the Trustee Acts may be made by County Courts. (28 & 29 Vict. c. 99, s. 1 (5).)

The scope of the Act is "to embrace every case of inconvenience that can possibly arise and call for a remedy." (*Bristow* v. *Booth*, L. R. 5 C. P. 91, per Bovill, C. J.)

Interpretation of terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

"Lands."

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

These words are "as wide as possible," and include the case of a man who is seised or possessed of lands jointly with others. (*Re Jones*, 33 Ch. Div. 414; see sect. 3, *post*.)

In sect. 15 leasehold property is not included in the word "*lands*," the word *seised* being used (*Re Mundel*, 8 W. R. 683), but they are included elsewhere, *e. g.*, in sect. 34.

Cf. *Re Matthew*, 2 W. R. 85, *post*, p. 75.

"Stock."

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company

or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein:

Shares in a joint stock bank are shares within this definition. (*Re Angelo*, 5 De G. & Sm. 278.)

By the Merchant Shipping Amendment Act, 1855 (18 & 19 Vict. c. 91, s. 10), "Shares in ships registered under the Merchant Shipping Act, 1854, shall be deemed to be included in the word stock as defined by the Trustee Act, 1850, and the provisions of such last-mentioned Act shall be applicable to such shares accordingly."

"Seised." The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands:

The word "seised" does not apply to leaseholds (*Re Mundel*, 8 W. R. 683), but does apply to an estate tail. (*Re Sherard*, 1 De G. J. & S. 421.)

Equitable estates. In *Re Williams* (5 De G. & Sm. 515) a vesting order of the equity of redemption in an infant, against whom in a foreclosure suit a decree for sale had been made, was refused; the mortgagee having the legal estate, and all equities being bound by the order for sale.

But in *Lechmere* v. *Clamp* (30 Beav. 218) on a foreclosure decree on an equitable mortgage, the mortgagor, who had absconded, was declared a trustee and a vesting order made.

"Possessed." The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

"Contingent right." The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

This definition is taken from that in 8 & 9 Vict. c. 106, s. 6.

"Convey." The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the Acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance, and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands:

3 & 4 Will. 4, c. 74.

A notice requiring the performance of certain acts will not amount to a tender of a conveyance. (*Rowley* v. *Adams*, 14 Beav. 130.)

Estate tail. In *Powell* v. *Matthews* (1 Jur. N. S. 973) it was held that a vesting order under this Act, if consented to by the protector of the settlement, bars all estates in remainder, and does not pass a base fee only under the Fines and Recoveries Act, 1834.

It was doubtful whether this definition included the case of a person who had been directed to execute a lease, but refused to do so.

Lease. In *Grace* v. *Baynton* (25 W. R. 506), in dismissing a summons to enforce the execution of a lease, Jessel, M. R., said "the case showed a defect in the Trustee Act, 1850, namely, although the Court had power, where persons refused to convey, either to appoint some person to convey in the place of the persons so refusing, or to make a vesting order, yet it had no such power where a person had been directed to execute a lease, but had refused to do so: in that case the Court must have recourse to attachment to enforce such execution."

But in *Hall* v. *Hale* (51 L. T. N. S. 226), where a decree had been made for specific performance of an agreement to grant a

lease, which the defendant refused to obey, Mr. Justice Kay held that he had jurisdiction under sect. 30 of this Act to appoint a person to execute the lease instead of the defendant.

Now a person may be appointed to execute a lease under the Judicature Act, 1884 (47 & 48 Vict. c. 61, s. 14, *post*, p. 49).

"Assign." The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

"Transfer." The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

"Lord Chancellor." The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being:

The Lords Justices, so long as intrusted with the sign manual, are included by the Lunacy Regulations Act, 1853, sect. 2, and see the Judicature Acts, 36 & 37 Vict. c. 66, s. 17; 38 & 39 Vict. c. 77, s. 7, *post*, p. 9.

"Lord Chancellor of Ireland." The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being:

"Trust." The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person:

Contract for sale. Where a contract for sale has not been completed in the lifetime

of the vendor, he cannot at his death be considered a trustee within the Act. (*In re Colling*, 32 Ch. Div. 333.)

But if the purchase-money has been paid to the vendor in his lifetime, he does become a trustee of the legal estate. (*In re Cuming*, L. R. 5 Ch. 72.)

And a settlor who has covenanted to settle in a marriage settlement, if the marriage is solemnized and the case becomes one of executed contract, becomes a trustee. (*Re Bradley*, 34 W. R. 148.)

Infant entitled subject to direction for maintenance.

This definition of "trustee" includes an infant the sole beneficial owner, subject to a direction in regard to maintenance vested in another. Accordingly, in *Gardner* v. *Cowles* (3 Ch. D. 304), it was ordered that infants beneficially interested should be treated as trustees of certain consols, and a person was appointed to convey them into Court; and this was followed in *In re Findlay*, 32 Ch. D. 221, but the Bank declined to act upon the order declaring the infant a trustee (32 Ch. D. 641), and the petitioner's solicitor agreed to abandon that part of the order. (See *post*, p. 109.)

Executors.

Owing to this definition, although the Court cannot remove an executor, it can appoint a trustee or trustees to perform the duties of an executor. (*In re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778).

The husband of a *feme covert* was, under the old law, a trustee within the meaning of the Act.

Thus, in *Re Wood* (3 De G. F. & J. 125), the wife of a lunatic was the sole surviving trustee of a sum of stock, and an order appointing new trustees and vesting the stock in them was made. (*Ex parte Bradshaw*, 2 De G. M. & G. 900.) But see now 45 & 46 Vict. c. 75, s. 18 (in which, however, there is no mention of real estate).

"Lunatic."

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo:

Cf. the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86).

"Person of unsound mind."

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

Infirmity of mind.

"I think that a person is of unsound mind within the meaning of the Act when, from continuing infirmity of mind, he is incapable

of managing his affairs. He could not be considered of unsound mind within the Act if his incapacity was a temporary one arising from an accident, as for instance, concussion of the brain, or from illness of a temporary character; but he is to be so considered when he is subject to a permanent incapacity of mind rendering him incapable of attending to business." (*Re Martin's Trusts*, 34 Ch. Div. 618, per Cotton, L.J.) Lord Justice Lindley, in *Re Phelps' Settlement Trusts* (31 Ch. Div. 351), expressed the opinion that to be of unsound mind within the Act a person must be in such a state that he would be found lunatic on inquisition. But he authorized Lord Justice Cotton to withdraw this distinction as "too refined," in *Re Martin's Trusts*.

In *Re Dewhirst's Trusts* (33 Ch. Div. 416), Cotton, L.J., expressed the opinion that a person who was paralytic, and unable through infirmity of mind to manage his own affairs, was of "unsound mind."

A person who is paralytic and deprived of the power of speech and unable to read and write, but is not suffering from any mental disease, is not a person of unsound mind within this section. In such a case a petition should be presented in Chancery and not in Lunacy. (*Re Barber*, 39 Ch. Div. 187.)

In *Re Campbell* (W. N. 1888, p. 176), an application was made by beneficiaries for the appointment of new trustees of settled property which comprised freehold lands, and for a vesting order. The last surviving trustee was 90 years old, and was stated in the petition to be in such a state of mental infirmity as to be incapable of acting in the trust. The medical evidence was that owing to his advanced age, and to his being at present subject to attacks of cerebral hæmorrhage, any attention to business would be likely to cause apoplexy: but that he could not be correctly described as of unsound mind. The Lords Justices (Cotton, Fry, and Lopes) held that it had not been shown upon the evidence that the trustee was, in the terms of the Trustee Act, 1850, sect. 2 "incapable from infirmity of mind to manage his own affairs"; that this being so there was no case for the exercise of the jurisdiction in Lunacy; and accordingly that the petition must be withdrawn and presented in the Chancery Division alone.

"Devisee."

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent

solely upon the operation of the laws concerning devise and descent:

"Mortgage." The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a Court of Equity be deemed merely a security for money:

In *Re King* (5 De G. & Sm. 644), a vesting order in the executrix of lands supposed to have descended on an infant heir-at-law was refused, "securities for money" having been bequeathed to her. (Cf. *Lawrence* v. *Galsworthy*, 3 Jur. N. S. 1049.)

"Person." The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate:

By the Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 10, this Act is extended to trustees of the private estate of the sovereign.

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

"Sole trustee" may mean all trustees.

The effect of this clause has been held to be that in sect. 23 the words "sole trustee" mean all the trustees where there are more than one. (*In re Hyatt's Trusts*, 21 Ch. D. 846; *Re Hartnall*, 5 De G. & Sm. 111. Contra, *In re Spawforth's Settlement*, 12 W. R. 978; 10 L. T. N. S. 641, commented on per Chitty J, 21 Ch. D. 848, 849, *post*, p. 37.)

Lord Chancellor may convey estates of lunatic trustees and mortgagees.

3. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in

such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Jurisdiction of Lords Justices.

By sect. 7 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), "any jurisdiction vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of her Majesty or her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such judge or judges so intrusted had been named therein instead of such Lords Justices. Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid." (As to the jurisdiction of the Lords Justices in lunacy, compare 16 & 17 Vict. c. 70, s. 2; 15 & 16 Vict. c. 87, s. 15; *Re Pattinson*, 21 L. J. Ch. 280; *Re Waugh*, 2 De G. M. & G. 279.)

Appointment of new trustees.

The appointment of a new trustee in place of one of unsound mind belongs to the jurisdiction in lunacy. (*Re Ormerod*, 2 De G. & J. 249, *post*, p. 34.)

In *Re Mason* (L. R. 10 Ch. 273), a testator devised real estate to trustees, their heirs and assigns, on certain trusts. The survivor of them devised all estates vested in him as trustee to three persons, one of whom became of unsound mind after proving the will. It was held that a petition for the appointment of new trustees, and of a person to convey in the place of the lunatic, was properly presented in lunacy only.

In *Re Chauncey* (14 W. R. 849), one of four trustees of a settlement was a lunatic, and one was unfit to act because of ill health. Upon a petition in lunacy, the Court appointed two new trustees in their place, and vested the real estate subject to the settlement, and the right to call for a transfer of the stock subject thereto, in the new trustees jointly with the two continuing trustees.

In *Re Davies* (3 Mac. & G. 278), an order was made appointing a new trustee, and vesting the trust premises in him jointly with the continuing trustees where one of three trustees was lunatic, though

the will contained a power of appointment of new trustees; and this case was followed in *Re Cooper* (25 L. J. Ch. 685; 4 W. R. 729). See also 16 & 17 Vict. c. 70, *post*, p. 54; and sect. 9 of the Trustee Extension Act, 1852.

Power.

Where a power to sell is given to a person of unsound mind, but not so found by inquisition, a vesting order cannot be made under the Acts, inasmuch as the lunatic has no estate vested in him. Such an order was made in a like case after the heir-at-law to whom the estate had descended had been served, but the Lord Chancellor feared the order would be of no service, but it might be taken *quantum valeat*. (Sug. R. P. Stat. 2nd ed. p. 413; *Re Gregory Porter*, 3 W. R. 583; 25 L. T. 262.)

In *Re Boyce* (12 W. R. 359), a trustee with a power of sale became lunatic, and a fresh trustee was appointed, an order being made vesting in him such estate (if any) as was vested in the former trustee.

Appointing person to transfer a mortgage.

Doubts were at one time entertained whether this section authorized the appointing a person to transfer a mortgage vested in a person of unsound mind, but they have been removed, and the practice is now settled that the section does extend to such a case. (*Re Nicholson*, 34 Ch. Div. 663.)

In *Re Vicat* (33 Ch. Div. 193), a testator appointed three trustees of his will, one of whom died in his lifetime, and gave a power of appointment of new trustees to the continuing trustees or trustee. One of the two trustees who survived him became of unsound mind and "unfit to act" within the wording of the power, and the continuing trustee appointed two new trustees to act with him. A petition was presented in Chancery and lunacy asking that these three persons might be re-appointed trustees and a vesting order made, so that the joint tenancy might not be severed, and *Re Pearson* (5 Ch. D. 982) was quoted as an authority in favour of such a course being adopted. On this Cotton, L. J. (33 Ch. Div. 404), observes:—

"I cannot follow *Re Pearson;* the order seems to me to have been made *per incuriam*. When there is any reasonable question whether trustees appointed under a power have been duly appointed, it may be quite right for the Court in a proper case to re-appoint them. But when they have unquestionably been duly appointed, the re-appointment of them by the Court is a nullity, and it is, in my opinion, wrong for the Court to appoint them trustees for the purpose of making a vesting order in a form which can only be used upon an appointment of new trustees. We cannot make the order proposed, but the desired end may be

attained by appointing a person to convey in the place of the lunatic."

(The petition was accordingly amended, and an order in this form subsequently made.)

And this section applies where the lunatic is not solely seised or possessed of land upon trust or by way of mortgage; and so far as *Re Dalgleish* (4 Ch. D. 143) and *Re Pearson* (5 Ch. D. 982) decide the contrary, they are not to be followed. "The doubt arose in consequence of the frame of the fifth section, which, after providing for the case of a lunatic being solely entitled to any stock or any *chose in action* upon trust or by way of mortgage, provides expressly for the case where other persons are entitled jointly with him. We are of opinion that the third section does apply to that case. There appears to us no reason why it should not apply. The interpretation clause provides that the word 'lands' shall extend to and include hereditaments of every tenure or description 'whatever may be the estate or interest therein.' Under these words, which are as wide as possible, it is clear that a lunatic who is one of several trustees or mortgagees is seised or possessed of lands upon trust or by way of mortgage within the meaning of the Act, unless there is something in the other parts of the Act to modify the construction. We do not think that section 5 has that effect. It would be very inconvenient if section 3 were not applicable, for there is no other section providing for dealing in lunacy with lands mortgaged. We therefore state our opinion that section 3 applies, and we can appoint a person to convey under section 20." (Per Cotton, L. J, *Re Jones* (*Zincraft's Trust*), 33 Ch. Div. 414; cf. *Re Batho*, 39 Ch. Div. 189; *post*, sect. 5.)

Lunatic declared a trustee.

In *Re Bloomar* (2 De G. & J. 88), where a lunatic had been declared, in a partition suit, a trustee of an undivided share held by him, it was doubted whether there was jurisdiction under this Act to make a vesting order, but under this Act and the Lunacy Regulation Act, 1850, the Lords Justices directed the committee to convey.

But in *Re Molyneux* (10 W. R. 512), it was held that there was jurisdiction to make the order under this Act.

And, from the case of *Herring* v. *Clark* (L. R. 4 Ch. 167), it would seem that in such a case an order may be obtained in Chancery under the Trustee Extension Act, sect. 1. (*Post*, p. 104.)

Costs.

As to costs of applications in lunacy, see *post*, sect. 51, p. 87.

Lord Chancellor may convey contingent rights.

4. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it

shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

5. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

The effect of this section is not to cut down the effect of sect. 3, coupled with the wide definition of the word "lands" in the interpretation clause. (*Re Jones*, 33 Ch. Div. 414, *ante*, p. 11.)

Circuity avoided.

In *Re White* (L. R. 5 Ch. 698) one of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled, declined to do anything. On a petition for a vesting order in the beneficiaries under this and the 24th section, James, L. J., said, "The order asked for is not within the strict letter of the Act. As, however, under the terms of the Act an order might be made vesting the right to transfer the shares in the trustees who are of

sound mind, and then by a second order that right might be vested in the petitioner on the ground of the refusal of the same trustees to act, I think I shall not be exceeding the powers of the Act in avoiding this circuity and making the order as prayed."

In *Re Wacher* (22 Ch. Div. 535), where one of three executors of the surviving executor of a testator was of unsound mind, an order was made under this section (following *Re White*, *sup.*), giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator.

See *Re Duce* (30 W. R. 759; *post*, sect. 35) as to the effect of this section in combination with sects. 32 and 35.

In *Re Batho* (39 Ch. Div. 189) a petition entitled in Lunacy and Chancery was presented by the two trustees of, and all the beneficiaries under, a settlement praying for an order re-appointing the two trustees, and vesting in them the trust property. The two petitioning trustees had been appointed under a power in place of two surviving trustees, one of whom was a lunatic and the other resident out of the jurisdiction. The committee of the lunatic was a co-petitioner, and the property subject to the settlement consisted of a sum of consols and money lent on a mortgage of freeholds.

Cotton and Fry, L.JJ., declined to re-appoint the new trustees, but made the following order:—

"Under sect. 3 of the Trustee Act, 1850, vest the lands subject to the mortgage in the new trustees; under sect. 5 of the same Act vest the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind who is resident out of the jurisdiction; and it appearing that he is out of the jurisdiction, vest the mortgage debt and the right to call for a transfer of the consols in the new trustees."

Power to transfer stock of deceased person.

6. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey estates of infant trustees and mortgagees.

7. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

The alteration in the devolution of trust and mortgage estates by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 30, *post*, p. 29), renders applications under this section less frequently necessary than formerly. But that section of the Conveyancing Act does not now apply to copyholds. (50 & 51 Vict. c. 78, s. 45, *post*, p. 106.)

Equitable mortgage with agreement to execute legal mortgage.

In *Re D. Jones & Co.* (W. N. 1888, p. 217) a mortgagor deposited the title deeds of property with his bankers to secure a debt due to them, and agreed to execute a legal mortgage when required to do so, and died intestate, leaving an infant heir. On a petition by the bank for an order vesting the legal estate in them, Mr. Justice North made the order, declaring the heir a trustee for the bankers, subject to the right of redemption.

In *Re Franklyn* (W. N. 1888, p. 217) a vesting order was made of a legal estate in copyholds outstanding in an infant heir.

Vesting order unnecessary where mortgagee has legal estate.

Where the legal estate is in the mortgagee, a vesting order against the infant heir of the mortgagor is unnecessary.

Thus, where there was a mortgage in fee of real estate, and the mortgagor devised the estate to an infant tenant in tail with remainders over, and died, and the mortgagee filed a claim for foreclosure, a petition for a vesting order by the purchaser after the property had been sold under an order for sale was refused. (*Re Williams*, 21 L. J. Ch. 437.)

Uses to bar dower.

Under this section a vesting order might be made to uses to bar dower (*Davey* v. *Miller*, 17 Jur. 908; 1 Sm. & G., App. XIX); though this was doubted in *Re Howard* (5 De G. & Sm. 435).

In *Re Powell* (4 Kay & J. 338), an order was made where an executrix was a married woman vesting the property in such person as the executrix and her co-executor should appoint, and in default of appointment in the executor and executrix.

In *Re Ellerthorpe* (18 Jur. 669), a testator had devised an equity of redemption to his three daughters subject to a legacy of 200*l.*

An order was made vesting the legal estate, which was outstanding in the infant heir of a mortgagee who had died intestate, in the three daughters, subject to the legacy.

An order may be made under this section, even where the infant heir is of unsound mind.

Infant heir of unsound mind.

In *Re Arrowsmith* (4 Jur. N. S. 1123), a mortgagee by his will gave his real and personal estate to B. upon trust to allow his wife to receive the rents and profits of the real estate, and the interest of the moneys due on mortgage, and on the wife's death on certain trusts. B. died intestate, and his heir-at-law was an infant of unsound mind, though not so found by inquisition. Upon a petition being presented in Lunacy, the Lords Justices held that the legal estate in the mortgaged premises passed to B., and declared the infant a trustee, and appointed a person to convey in his stead. The order was entitled in Chancery as well as in Lunacy, and Lord Justice Knight Bruce "thought the case was within the ordinary jurisdiction of the Court of Chancery, and it was not necessary to resort to the jurisdiction in Lunacy."

Service.

As to service on an infant heir being necessary, see *Re Jones* (22 W. R. 837); *Re Adams* (35 W. R. 770). Contra, *Re Tweedy* (9 W. R. 398); *Re Willan* (9 W. R. 689; *post*, p. 76).

Day to show cause.

It would seem that the infant heir of a mortgagor cannot have an immediate order for foreclosure made against him either under this section or sect. 30, whether the mortgage is legal or equitable, unless the decree be made by consent.

In *Gray* v. *Bell* (30 W. R. 606; 45 L. T. N. S. 521) a mortgagor died, having by his will devised the mortgaged property, subject to an annuity, to his son, with a gift over, in the event of the son predeceasing the annuitant, to two infants. A foreclosure action being brought, a day to show cause was asked on behalf of the infants, and Mr. Justice Fry said, "I think I must give the day to show cause. Such is clearly stated in Seton to be the practice, and I think the preponderance of authority is in favour of the old practice."

In *Bennett* v. *Harfoot* (19 W. R. 428; 24 L. T. N. S. 86), at the hearing of a foreclosure suit against the infant heiress-at-law of a mortgagor, it appeared that the mortgaged property was not worth the money due on the mortgage. *Croxon* v. *Lever* (12 W. R. 237) and *Billson* v. *Scott* (Seton, 3rd ed. 685) were cited to show that a day to show cause need not be given; and Vice-Chancellor Stuart said that it was no longer the practice to give a day to show cause; and, following *Croxon* v. *Lever*, made a decree for foreclosure absolute in the first instance, the plaintiff undertaking to pay the costs of the infant defendant.

Immediate order for foreclosure made by consent.

In *Wolverhampton and Staffordshire Banking Co.* v. *George* (24 Ch. D. 707), judgment for an immediate foreclosure absolute against an infant heir-at-law of a mortgagor was granted, the plaintiffs offering to pay the defendant's costs of the action as between solicitor and client, and the defendant's counsel not asking for liberty to redeem, or that an account should be taken of what was due to the plaintiffs, upon the Court being satisfied by evidence that the value of the property was not sufficient to pay the amount of the sum due on the mortgage together with interest and costs, and that it would be for the benefit of the infant to give judgment in that form.

In *Younge* v. *Cocker* (32 W. R. 359), an application by a legal mortgagee for an order for immediate foreclosure against an infant defendant without a day to show cause was granted, the mortgagee offering to pay the infant's costs as between solicitor and client, there being evidence that the mortgage debt exceeded the value of the property, and the guardians of the infant being of opinion that it was for the infant's benefit that an immediate order should be made.

In *Mellor* v. *Porter* (32 W. R. 271; 25 Ch. D. 158), the facts of the case and the authorities are summed up in the judgment of Mr. Justice Kay.

"This action is for the realization of an equitable mortgage created by deposit of title deeds without any memorandum. The mortgagor has since died intestate, and the defendants are his widow and his heir-at-law, who is an infant. The question is whether, in the ordinary decree, which is otherwise a matter of course, there should be contained what is commonly known as 'a day to show cause,' that is, a leave reserved to the infant on being served with a *subpœna* to show cause against the judgment within six months after his coming of age.

"By 11 Geo. 4 & 1 Will. 4, c. 47, s. 10, the right of parol demurrer on behalf of an infant defendant is taken away, and by sect. 11, in case of a decree for sale for payment of debts, the infant will be made to convey, and the conveyance will have the same effect as if he was of full age. But, in *Price* v. *Carver* (3 My. & Cr. 157), which was a suit to foreclose an equitable mortgage, the Lord Chancellor said that the parol demurring and the day to show cause were entirely different. In the one case nothing is done to affect the infant, but when a day is given the decree is complete, subject only to his showing cause against it within the time allowed; and the decree gave the infant a day to show cause. Accordingly, it has always been held that the old practice of giving

Price v. *Carver.*

a day to show cause in an action for foreclosure (*Williamson* v. *Gordon*, 19 Ves. 114), or where the decree directed the infant to perform any act (*Walsh* v. *Trevannion*, 16 Sim. 178), was not affected by that statute, except in the special case thereby provided for. The later Act—2 & 3 Vict. c. 60—extending these provisions to the case of a mortgage, as well as a sale of an infant's estate, does not affect the question. The Trustee Act, 1850, ss. 20, 29, and 30, enables the Court, where there has been a decree for sale or conveyance, to declare persons bound by such decree to be trustees, and to make a vesting order, or appoint some one to convey their interests; and, as this power is expressly given even as to the interests of unborn persons, it is difficult to see why the section does not apply to the case of an infant defendant.

Newbury v. *Marten*.

"In *Newbury* v. *Marten* (15 Jur. 166), Lord Cranworth held, that in the common decree for foreclosure there must be a day to show cause, notwithstanding the 7th and 8th sections which relate to a mortgagee. According to the report no reference was made to sect. 30. The common decree for foreclosure in the case of a legal mortgage would not contain an order for conveyance, and this is probably the reason why sect. 30 was not referred to. But in the case of an equitable mortgage, as the foreclosure alone would not vest the legal estate, although the judgment should be in terms for foreclosure, it is usual to direct a conveyance by the defendant. (*Lees* v. *Fisher*, 22 Ch. D. 283.)

Foster v. *Parker*.

"The case of *Foster* v. *Parker*, (8 Ch. D. 147) before the late Master of the Rolls, Sir G. Jessel, was an action for foreclosure against the infant heir, to whom the estate descended by reason of the disclaimer of the trustees of the will, and who was consequently simply a trustee. In a later case of *Backhouse* v. *Hornsey*, on the 20th of December 1880, a note of which has been furnished me by the registrar, the same judge decided that where the infant had the legal estate he must, in a decree for foreclosure against him, have a day to show cause, the Master of the Rolls professing to follow *Newbury* v. *Marten*. According to the registrar's note, his lordship stated that, in his opinion, it was a useless practice, but must be altered, if at all, by Act of Parliament. If the infant had the legal estate this mortgage must have been equitable, and the decree would direct a conveyance; and this, therefore, is an express decision that sect. 30 of the Trustee Act does not apply. This is not following *Newbury* v. *Marten*, because, in that case, the mortgage being legal, there would not be a direction to convey. I have looked at the record in the case of *Backhouse* v. *Hornsey*. It was clearly the case of an equitable mortgage, and the decree contains

Backhouse v. *Hornsey*.

a direction that the 'infant defendants upon their attaining twenty-one execute a proper conveyance to the plaintiffs, to be settled by the judge in case the parties differ,' and gives them a day to show cause. (Reg. Lib. 1879, A. p. 1459.)

"Obviously, a direction to convey when the infant attains twenty-one would not authorize the Court to declare him a trustee before that age. But, in other cases, as in a decree for partition or sale under the Partition Acts, the practice seems to be to direct a conveyance at once by an infant defendant, and then to declare him a trustee without giving him a day to show cause. However, in the case of a legal mortgage, when an infant defendant has an equitable interest, as the decree against him for foreclosure would not direct him to convey, the old practice of giving him a day to show cause remains unaffected (*Newbury* v. *Marten*), and it seems somewhat irrational that he should have a day to show cause in that case, and not where he has the legal estate.

"My own opinion is, that sect. 30 of the Trustee Act ought to be held to apply to all cases where there is judgment against an infant for an immediate conveyance, but this is not the form of a judgment for foreclosure in the case of an equitable mortgage.

"I must follow *Price* v. *Carver*, and the decision of Jessel, M. R., by directing the infant to convey when he attains twenty-one, and giving him a day to show cause. This I understand is now the ordinary form of judgment in case of foreclosure of an equitable mortgage."

Power to discharge contingent right of infant trustees and mortgagees.

8. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the Court.

9. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such

manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Heir cannot be found.

In *Wilks* v. *Groom* (6 De G. M. & G. 205), a testator devised lands in trust to sell for payment of debts. The trustees disclaimed, and the heir-at-law could not be found; the lands were sold under a decree in a suit for administration, and an order was obtained under this Act appointing the vendor's solicitor to convey to the purchasers. The purchasers objected. Lord Cranworth, L. C., said (*Ib.*, p. 209) "he did not see the difficulty suggested on behalf of the purchaser. It was hardly possible to make the matter clearer than it was made by the language of the Act. Applying the terms of the 9th section, there was here a person solely seised, the heir-at-law of the testator (the trustees appointed by the will having disclaimed), and there had been a decree made in the suit in his absence. The heir was thus in fact a trustee who could not be found, and under these circumstances the Court had power to make an order vesting the property in such person or persons and in such manner as the Court might direct. Then under the terms of the 20th section, wherever the Court might have made a vesting order it might make instead an order appointing a person to convey."

Heir out of jurisdiction.

In *Re Skitter* (4 W. R. 791), where a deceased mortgagee in fee died intestate as to trust estates, a vesting order was made of the legal estate outstanding in his heir, who was out of the jurisdiction, although the mortgagee had been in receipt of rent and profits, so that sect. 19 did not apply.

Where a mortgage in fee to secure 350*l.* was transferred to D. in consideration of 385*l.*, which was in fact paid by the petitioners, though D. executed no declaration of trust, and D. became bankrupt and went out of the jurisdiction, an order was made vesting the mortgaged property, subject to the equity of redemption. "As between the bankrupt and the petitioners, he was strictly a trustee for them. The mortgagor was not claiming to make the bankrupt a trustee for him." (*Re Barber*, W. N. 1888, p. 11, per North, J.)

Where a will contained a direction to sell real estate without naming the person to sell, and there was no devise of real estate, it not being clear whether a sufficient power of sale was implied in the executors, or if there was a sufficient charge of debts, the heir-at-law was declared a trustee, and, as he was out of the jurisdiction, a vesting order was made under this section. (*Hooper* v.

Strutton, 12 W. R. 367. Cf. *McMurray* v. *Spicer*, L. R. 5 Eq. 527 *infra*, sect. 10.)

Mortgagor absconded.

Where a mortgagor had absconded, he was declared a trustee in a foreclosure suit, and an order was made vesting the estate in the mortgagee. (*Lechmere* v. *Clamp*, 30 B. 218; 31 *Ib.* 578.) It was held in *Smith* v. *Boucher* (1 Sm. & G. 72) that a separate application must be made for such an order, and such declaration would not be made on application to make the foreclosure absolute.

Court may make order in cases where persons are seised of lands jointly with parties out of the jurisdiction of Court, &c.

10. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Section does not apply to mortgages.

"The words 'as if the trustee out of the jurisdiction,' near the close of the section, show that it only applies where the persons are so seised upon a trust. When I come to inquire what is meant by a 'trust,' I find it is provided by the interpretation clause that the word 'trust' shall not mean the duties incident to an estate conveyed by way of mortgage; and having regard to that, I think there is no authority in the Court to appoint a person to convey the estate of a mortgagee under such circumstances as occur here." (Per Lord Romilly, *Re Osborn*, L. R. 12 Eq. 392.)

In *Re Osborn*, a mortgage of real estate had been made to C. and P., and a sale of the property by the mortgagor took place after P. had gone abroad, and the amount payable to the mortgagees was invested in the joint names of C. and P. A petition was presented by C. and the mortgagor asking for an order vesting P.'s estate in the purchaser.

In refusing to make the order, however, Lord Romilly observed, further, "There are possibly two cases in which the Court might have authority under this section to appoint a person to convey the estate of a mortgagee who has been paid off. One is *where the advance has been made out of trust funds*, and a *new trustee has been*

Except (1) where mortgagees

appointed in consequence of one of the former trustees being resident out of the jurisdiction. In that case the Court would probably make an order, but only at the instance of the *cestuis que trustent*, not of the mortgagee, who is a perfect stranger to the trust. are trustees, and *cestuis que trustent* petition;

"Another case may be where *two persons advance distinct sums* out of their own moneys to make up one single sum: there if each were paid off and gave a receipt in full for all that was due to him, that might amount to a declaration that he was merely a trustee of the legal estate, and the Court might possibly make an order." or (2) advance of distinct sums, and receipt given.

Re Walker (3 Ch. D. 209) fell within the first exception pointed out by Lord Romilly. A., one of three trustees, went abroad, the mortgage was paid off during his absence, and the debt and security, except the legal estate outstanding in A., were vested in a transferee, and a new trustee was appointed by deed in A.'s place. It was held there was a jurisdiction under this section to vest the outstanding legal estate in the transferee. (Cf. *Re Watkin*, W. N. 1876, p. 232.)

The section applies where a trust estate has descended to coparceners, one of whom is out of the jurisdiction. Coparceners.

Thus, in *Re Templer* (4 N. R. 494), a legal estate vested in a mortgagee descended to two coparceners, one of whom was out of the jurisdiction, and an order was made vesting it in the other alone, Stuart, V.-C., stating that he was clearly of opinion that the case was within the 10th section.

In *McMurray* v. *Spicer* (L. R. 5 Eq. 527, p. 540), Malins, V.-C., seems to have held that in such a case an order would be rightly made under sect. 9, coparceners being "seised solely" of their respective shares. But in *Re Greenwood* (27 Ch. D. 357, p. 361), Pearson, J., said, "I do not think the words seised jointly, in sect. 10, are to be construed strictly as referring only to a joint tenancy at law. I think the words are used in the widest possible sense, and, though coparceners may not be strictly joint tenants at law, I think they are seised jointly within the meaning of sect. 10."

Where one of several trustees is out of the jurisdiction the Court can vest the legal estate in the new and continuing trustees without severing the joint tenancy. (But cf. *Re Chell*, *post*, p. 31.) Joint tenancy not severed by order under section.

In *Smith* v. *Smith* (3 Drew. 72; 18 Jur. 1047), on a suit to appoint new trustees, it appeared that of two remaining trustees of a marriage settlement, one had gone out of the jurisdiction and one was willing to act. It was held that a vesting order might be made to vest the estate in the new trustees to be appointed for such estate as was vested in the continuing and absent trustees.

Vice-Chancellor Kindersley said "the question was whether the Trustee Act, or that part of it which authorized the Court to make a vesting order, was applicable to the case of two or more trustees, one of whom was out of the jurisdiction. In *Re Watts* (9 Hare, 106) and *Re Plyer* (9 Hare, 220) Turner, L. J. (then V.-C.), declined to make such an order. His Honour had taken pains to ascertain what was the practice, and he found that orders of this kind were now made by the Court; the Lords Justices themselves concurring in that view, and making such orders.

"It must therefore be understood that there was no longer any doubt upon the construction of the Act in this respect, and the Court would without any hesitation make vesting orders under circumstances such as those in the present case."

In *Re Marquis of Bute* (Johns. 16; 5 Jur. N. S. 487) lands were devised to C. S. and others in trust for the infant marquis. C. S. went abroad, and W. S. was under a power appointed a trustee in the place of C. S. W. S. and the other trustees petitioned for a vesting order. Vice-Chancellor Wood said (Johns. 17), "The statement made by Vice-Chancellor Kindersley in *Smith* v. *Smith*, as to the practice of the Court, is equally applicable to a case like the present, where the Court could not make a vesting order, except under the 10th section. The doubt whether an order under the 10th section vesting lands subject to the trust in the new and in the continuing trustees would not have the effect of severing the joint tenancy no longer exists, and according to the present practice of the Court there was no objection on that ground to making such an order."

Contingent rights of trustees.

11. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly

12. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the juris-

diction of the Court of Chancery or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

entitled with others out of the jurisdiction of the Court to a contingent right in lands.

13. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain which of several trustees was the survivor.

14. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Where it is uncertain whether the last trustee be living or dead.

15. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall

When trustee dies without an heir.

not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Leaseholds.

As the word "seised" is used, this section does not apply to leaseholds. (*Re Mundel*, 8 W. R. 683; *Re Morris*, 4 N. R. 480.)

Copyholds.

Under this section in combination with sect. 28, where a sole trustee of copyholds held in trust for a man absolutely, on the death of the trustee intestate and without an heir, an order was made vesting the property in the *cestui que trust*. (*Re Godfrey*, 23 Ch. D. 205.)

By sect. 30 of the Conveyancing Act, 1881, trust and mortgage estates, on the death of a sole trustee, vest in his legal personal representative, notwithstanding any testamentary disposition. That section, however, does not now apply to copyholds. (*Re Mills*, 37 Ch. D. 312; *post*, p. 106.)

Devolution of trust estates, 1874—1881.

By sect. 5 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), a bare legal estate in fee simple outstanding in a trustee vested like a chattel real in the legal personal representative from time to time of such trustee. This was repealed as from the 1st January, 1875, by sect. 48 of the Land Transfer Act, 1875, which enacted that the provision should apply only in case of death intestate.

"Bare trustee."

Where a surviving trustee of real estate died intestate after the passing of the Vendor and Purchaser Act, 1874, and prior to the commencement of the Land Transfer Act, 1875, the legal estate vested in his heir-at-law, notwithstanding the provisions of the Land Transfer Act. (*Christie* v. *Ovington*, 1 Ch. D. 279.)

A trustee with a beneficial interest in the trust estate is not a "bare trustee" within sect. 48 of the Land Transfer Act, 1875. (*Morgan* v. *Swansea Sanitary Authority*, 9 Ch. D. 582.)

The late Master of the Rolls doubted the correctness of Vice-Chancellor Hall's decision in *Christie* v. *Ovington*, *sup.*, that a trustee with active duties to perform, but without any beneficial interest in the trust estate, was not a bare trustee. (9 Ch. D. p. 585.)

Applies to constructive trusts.

In *Re Wilkinson* (10 Jur. N. S. 716; 12 W. R. 572) a vendor, after conveying the equitable estate, became seised of the legal estate, and died intestate and without an heir. He was held to be

a trustee within the Act. Vice-Chancellor Kindersley said: "If this were a question of specific performance, I should feel great difficulty in applying the Trustee Act, 1850; but it appears not to be a case of mere contract, but an absolute conveyance of the equitable fee simple. . . . My opinion is that this case comes within that Act, as by the interpretation clause 'trust' is defined to include implied and constructive trusts."

Mortgage in form of trust for sale.

In *Re Underwood* (3 K. & J. 745), by indentures of lease and release L., in 1857, in consideration of 350*l.*, conveyed to Underwood, his heirs and assigns, certain freehold land upon trust, in case the principal and interest should be repaid by a given day, for L., his heirs and assigns, but, in case default should be made, for sale; and the trusts of the purchase-money in such case were to be for payment of principal, interest, and costs, and, subject thereto, for L., his executors, administrators, and assigns. Default was made, Underwood died intestate, and it was impossible to find his heir. His personal representative petitioned for a vesting order under this section. Vice-Chancellor Wood said (*Ib.* p. 747):—

"The difficulty is to say whether the deed of 1837 is, in the terms of the definition of a mortgage in the second section of the Act, 'merely a security for money.' It appears that, in the event of a sale, the surplus moneys arising from the sale are directed to be paid to L., 'his executors, administrators, and assigns,' and not to him, 'his heirs or assigns.' The deed, therefore, operates to convert the property as between the real and personal representative of L.: and that being so, I think it must be held to be something more than merely a security for money; and I shall make the order vesting the legal estate in the premises in the petitioner."

In *Re Keeler* (9 Jur. N. S. 95; 11 W. R. 62), Vice-Chancellor Kindersley, following *Re Underwood*, held that a mortgagee in fee, by an instrument in the form of a trust for sale, was sufficiently a trustee to enable an order to be made under this section (when the mortgagee died intestate as to trust estates, and his heir was not known) on the petition of his executors, though such an order could not have been made under sects. 9 or 19.

Contingent right of unborn trustee.

16. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release

and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Order in a suit.

Such an order may be made in a suit. Thus, in *Hargreaves* v. *Wright* (1 W. R. 408), contracts for sale of different parts of an estate had been entered into with different purchasers by a father and son, who had a joint power of appointment over the whole. The son died before the conveyances were executed. A bill was filed by one purchaser on behalf of himself and others against the father, who had the legal estate for life with remainder to an infant tenant in tail. Turner, L. J., said all the purchasers should be plaintiffs, and the other purchasers were accordingly joined, the defendants undertaking not to object for multifariousness.

Wood, V.-C., made the order asked for, directing (*inter alia*) payment into Court by the respective purchasers of their respective purchase-moneys before a certain day, with a declaration that on such payment being made by each purchaser the estate comprised in his contract should be discharged from the contingent rights of the unborn persons claiming under the settlement, and thereupon A. be directed to convey the same lands on behalf of the infant tenant in tail.

And the Court will on petition discharge the contingent rights of unborn persons in favour of a purchaser under a decree, and make an order vesting in such purchaser the estates of infants, and the contingent rights of unborn infants.

Thus in *Wake* v. *Wake* (1 W. R. 283) Stuart, V.-C., said "that the language of the Acts, particularly in sects. 16 and 30, was so very sweeping that he could entertain no doubt as to their intention. The object of the Acts was perfectly plain, viz., to enable the Court to effect a sale and make a good title to purchasers; they must both be read together, and when the unborn *cestuis que trustent* should have been converted into trustees by sect. 1 of the Extension Act, the Court would be enabled to dispose of their interest by the provisions of the preceding Act."

Power to convey in place

17. *And be it enacted, that where any person jointly or solely seised or possessed of any lands upon any trust shall,*

after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

of a refusing trustee.

Repealed by the Trustee Extension Act, 1852, s. 2.

In *Rowley* v. *Adams* (14 Beav. 130) a copyhold vested in a married woman was sold under a decree ordering all proper parties to join, and she stated in writing that she would never join in surrendering certain copyholds. It was held that the case fell within the section as regards the wife. A notice had been given husband and wife, but no conveyance actually tendered. The Master of the Rolls said, "If in fact there be any instrument which could have been tendered to each of them, and they had declined to execute it, or had neglected to make the surrender for the space of twenty-eight days, I should have been prepared to make the declaration under the 30th section, and to have ordered the vesting accordingly. But what was tendered was merely a notice requiring them to do certain acts, and I am therefore afraid that all I can do is to make an order against the wife in respect of the copyholds."

The provisions of the 2nd section of the Act of 1852 (*post*, p. 105) allow an order to be made on refusal or neglect, and an actual tender of a conveyance is no longer necessary.

18. *And be it enacted, that where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last-mentioned person, have*

Power to convey in place of person entitled to contingent right.

stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right.

Repealed by the Trustee Extension Act, 1852, *q. v.* (*post*, p. 105).

Power to convey in place of mortgagee.

19. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found:

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered

to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Conveyancing Act, 1881.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, trust and mortgage estates vest in the personal representatives of a deceased sole trustee or mortgagee, notwithstanding any testamentary disposition, and sect. 4 of the Vendor and Purchaser Act, 1874 (which provided that the legal personal representative might convey the legal estate in mortgaged property), was repealed.

Copyholds.

By the Copyhold Act, 1887, s. 45, sect. 30 of the Conveyancing Act, 1881, is repealed as to copyholds (*post*, p. 106).

In *Re Minchin* (2 W. R. 179, *post*, s. 46) a vesting order was made where a mortgagee left no heir.

Sect. 4 of the Vendor and Purchaser Act, 1874, did not enable the personal representative to convey on a sale under a power in the mortgage deed; and so in *Re White* (W. N. 1881, p. 115; 51 L. J. Ch. 856), where the executor of a deceased mortgagee, who had made no devise of trust estates, sold under a power in the deed, a vesting order of the legal estate was made, the mortgagee's heir-at-law being unknown.

Reconveyance.

Where a mortgagee in fee, who had never been in possession or receipt of rents and profits, died intestate as to the mortgaged hereditaments, and his heir could not be found, an order was made vesting the legal estate in his executors. (*Re Boden*, 1 De G. M. & G. 57; 9 Hare, 820.)

Lord Cranworth there said (1 De G. M. & G. 58): "I think I see even upon the face of the clause that the Legislature did not mean to confine its operation to a case of simple reconveyance in

the literal sense of the word. It has the words 'in such manner and for such estate as the said Court shall direct;' and that is not all, for it goes on to say that the order shall 'have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate,' words which do not seem confined to a reconveyance."

Administrator.

In *Re Meyrick* (9 Hare, 116), Vice-Chancellor Turner held that this section did not enable the Court, on the petition of an *administrator* of a mortgagee who has died intestate, and whose heir is unknown, to vest the mortgagee's estate in such administrator, subject to the equity of redemption, so long as the mortgage money remained unpaid.

And in *Re Hewitt* (23 L. J. Ch. 302), where the legal estate in mortgaged property outstanding in co-heiresses of a deceased mortgagee was vested in the administrator, who was beneficially interested, and the co-heiresses were declared trustees for him, although there was no present intention to sell or transfer the mortgage, upon a difficulty being found in drawing up the order, and the matter being brought before the full Court of Appeal, Lord Cranworth "doubted whether, as the case stood at present, the Court would make an order." Lord Justice Knight-Bruce said that when the property was sold, if it was intended to exercise the power of sale, the case would be clear. Then, on an amendment of the petition, the matter might be brought on again.

But in *Re Lea* (6 W. R. 482), a petition was presented for a vesting order in the executors of a deceased mortgagee whose heir-at-law was resident out of the jurisdiction; and although *Re Hewitt* was cited, Vice-Chancellor Wood said that until *Re Boden* (1 De G. M. & G. 57) was overruled, he must follow that decision, and made the vesting order as prayed by the petition.

Power to appoint a person to convey in certain cases.

20. And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to

convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies, and their officers and servants, for all acts done or permitted to be done pursuant thereto.

Under this section, wherever the Court may make a vesting order, it may instead appoint a person to convey. (*Wilks* v. *Groom*, 6 De G. M. & G. 205; *ante*, p. 19.)

Where a trustee has been appointed under a power in the place of a person of unsound mind, a vesting order in lunacy would sever the joint tenancy, there being no jurisdiction to deal with the estate of the continuing trustee. (*Re Chell*, 49 L. T. N. S. 196.) Accordingly, a person was appointed to convey under this section where one of two trustees of a will had become of unsound mind, and fresh trustees had been appointed, it being desired to avoid

severing the joint tenancy. (*Re Vicat*, 33 Ch. Div. 103; *Re Jones*, 33 Ch. Div. 414.)

A person may be appointed under this section to convey contingent rights of unborn persons. (*Hargreaves* v. *Wright*, 1 W. R. 408; *ante*, sect. 16.)

It is doubtful whether a person appointed to convey for some one else can exercise for him a statutory power under 1 Will. 4, c. 47. (See *Wood* v. *Beetlestone*, 1 K. & J. 213, p. 215, per Wood, V.-C.; *post*, p. 45.)

Person entitled absolutely.

In *Re Dickson* (W. N. 1872, p. 225; 27 L. T. 671; *nom. Re Dixon*, 21 W. R. 220), J. D. died in 1851, having by trust, disposition, and settlement in the Scotch form, vested a sum of 800*l.*, Reduced Three Per Cent. Annuities in the names of two trustees, of whom the survivor, B., had left no legal personal representative. The petitioner had become absolutely entitled to the fund. Wickens, V.-C., did not think that "person" in this section meant the person beneficially entitled, but that the trustee was meant in the latter as well as the former part of the section. He therefore declined to make a vesting order directly in the petitioner, but said (21 W. R. 220), "I think I can accomplish what you desire, but in a circuitous manner, and not in the direct way you request. I will make an order appointing the beneficiary, who has become absolutely entitled, a trustee of the fund for himself, and he may then apply the fund for his own benefit. He is responsible to himself only."

(This was followed in *Re Price*, W. N. 1883, p. 202.)

Form of order.

In *Hancox* v. *Spittle* (3 Sm. & G. 478), real estate devised to married women and infants was directed to be sold by a decree in a creditor's suit, and the vendor's solicitor was appointed to convey under sect. 20. The order was—

"And it appearing that the defendant, D. G., is seised of one-sixth of the lands in the said master's report, dated the 30th day of June, 1856, mentioned, being the lands directed to be sold by the said order dated the 6th of July, 1854, that B. G. is seised of one other sixth part of the said lands, and that [S. H., J. H., A. H., J. G. H., M. W., P. B., the infant P. W., and S. W., seised of the other four-sixths]: And the judge to whose Court this cause is attached being of opinion that the said D. G., B. G., &c., are to be deemed so seised upon a trust within the meaning of the Trustee Act, 1850: This Court doth order that W. of , in the county of , be appointed to convey the lands comprised in the said master's report of the 30th day of June, 1856, for the estate of the several defendants D. G., B. G., &c., therein."

21. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the Counties Palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same Courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: Provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act.

As to lands in Lancaster and Durham.

By the Court of Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82), s. 12, all the powers and authorities given by the Trustee Acts, 1850 and 1852, are extended to the Court of Chancery of the County Palatine of Lancaster, with respect to all lands and personal estate within the said county, but persons within the limits of the jurisdiction of the High Court of Chancery are not to be deemed absent trustees or mortgagees by the Court of Chancery of the County Palatine.

Lancaster.

Where suits were instituted in the Court of Chancery of the County Palatine, and in the Court of Chancery, dealing with lands both within the County Palatine and in Chester, Lord Romilly, M. R., on being applied to to stay the action on the ground that the Court of Lancaster had jurisdiction, refused to do so (*Wynne* v. *Hughes*, 26 Beav. 377), and said (*Ib.* p. 380):—

"I doubt very much whether the Acts of Parliament extending the jurisdiction of the Court of the County Palatine intended to enable a gentleman, resident in Kent, to file a bill in that Court against his neighbour for specific performance of an agreement for a gavelkind estate situate in Kent. 17 & 18 Vict. c. 82, s. 12, speaks of land and personal estate within the county."

Land and personal estate within county.

The appointment of a new trustee, in place of one of unsound

Jurisdiction in lunacy.

mind not so found, belongs to the jurisdiction in Lunacy and not in Chancery, and cannot, therefore, be exercised by Court of Chancery of Lancaster.

Lord Justice Turner (*Re Ormerod*, 3 De G. & J. 249, 251) said:—

"By the statute 17 & 18 Vict. c. 82, the Duchy Court has indeed, as to lands and personal estate within its jurisdiction, all the powers under the Trustee Acts which by those Acts are given to the Court of Chancery in England, but we consider it is now settled . . . . . that the power to appoint new trustees in the place of trustees of unsound mind not so found by inquisition is by the Trustee Acts given, not to the Court of Chancery, but to the Lord Chancellor. The point came before the Master of the Rolls and the Lord Chancellor in a case (*Re Hall*) on the 16th of July, 1856. The Master of the Rolls had declined to make the order, and it was made by the Lord Chancellor on the petition being amended and addressed to him. Again, Vice-Chancellor Kindersley, in *Re Good Intent Society* (2 W. R. 67), after looking into the Acts, expressed his opinion that he had no jurisdiction in such cases. In another case, *Re Piggott* (4th March, 1858), Vice-Chancellor Wood having intimated that it would be more safe that the order should be made by the Lord Chancellor or the Lords Justices, the matter was mentioned to the full Court, and that Court was of an opinion that the jurisdiction had always been considered to be in the Lord Chancellor. We understand, too, that since the decision in that case the practice has been considered to be settled, and the Vice-Chancellors have declined to make such orders, referring the parties to the Lords Justices."

When trustees of stock out of the jurisdiction.

22. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint; and when any sole trustee of any stock or

chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

Feme covert.

In 1852, in a case where a testator in 1835 appointed P. and Elizabeth Bradshaw executor and executrix of his will, and in 1838 the executrix married a man who sailed for the West Indies in 1839 and had never since been heard of, it was held that the husband was a trustee within this section. (*Ex parte Bradshaw*, 2 De G. M. & G. 900.)

But now, by sect. 18 of the Married Women's Property Act, 1882, a married woman who is an executrix, administratrix, or trustee, alone or jointly with others, may sue or be sued in that character without her husband.

Dividends includes future dividends.

This clause applies to future, as well as to past, dividends. "A different construction would necessitate repeated applications to the Court, whenever it was inconvenient to appoint a new trustee in the place of one who might go out of the jurisdiction for a limited, but considerable, time." (*Re Peyton*, 6 W. R. 429, per Romilly, M. R.)

"Sole trustee."

In *Re Randall* (1 Drew. 401), L. and B. being trustees, the master found that it was uncertain whether L. was living or dead. B. subsequently died, and a petition was presented on the footing that L. was a "sole" trustee. Vice-Chancellor Kindersley said it appeared to him, on careful consideration of the Act, that he could not strain the construction so as to make it apply to the case in its existing state. "The object is that I should proceed on the footing that L. is living and a sole trustee. Now the term 'sole trustee' in the Act has a clear and definite meaning; it means a person originally a sole trustee, or one who has become a sole trustee by survivorship. As the matter now stands, I cannot predicate that of L., as it appears by the master's certificate that at least some time ago it was uncertain whether he was living or dead. I think that the case is not within the Act." But see *Re Hyatt*, 21 Ch. D. 846; *infra*, p. 37.

Vesting in beneficiary.

In *Ex parte Bradshaw* (2 De G. M. & G. 900), *supra*, an order vesting property in a beneficiary absolutely entitled was made.

And where a sum of stock was settled on the trusts of a marriage settlement, of which the trustees were dead, the wife being fifty-eight, and having assigned all her interest to her husband, who was one of the *cestui que trustent*, and there being no children of the marriage, Vice-Chancellor Stuart ordered the right to transfer to vest in the husband, so that he might transfer to himself. (*Re Ryan*, 9 W. R. 137.)

But in *Re Brass* (4 W. R. 764) the Court refused to make an order vesting *choses in action* vested in two trustees within the jurisdiction in a *cestui que trust* absolutely entitled only. Vice-Chancellor Kindersley thought *primâ facie* that as the petitioner was absolutely entitled, an order might be made vesting the mortgage debts and the right to transfer the shares in the petitioner, which would save considerable expense. Upon referring, however, to the 22nd section, he doubted whether he could make such an order. It was suggested, in the case of shares in the banking company, an order might be made vesting the right to transfer in the petitioner, as the words of the 20th section authorized the secretary or officer of the company to transfer the stock to the person or persons to be named in the order; but his honour thought that in a case where, under the 22nd section, he could make an order vesting in one person (which was confined to the case of a sole trustee), he could only make an order to transfer to one person.

And where a petition was presented by a beneficiary who was absolutely entitled to property held in trust for him by a person who had become a lunatic, it was held that an order vesting the property in the beneficiary ought not to be made, but a fresh trustee ought to be appointed, and the property vested in him. (*Re Howarth*, 16 Ch. D. 672.)

Beneficiary appointed trustee.

And in such a case the beneficiary may be appointed a trustee for himself. (*Re Dixon* or *Dickson*, 21 W. R. 220; W. N. 1872, p. 223; followed, *Re Price*, W. N. 1883, p. 202; *ante*, p. 32.)

And in *Re Currie* (10 Ch. Div. 93), where the sole surviving trustee of a sum of stock under a settlement was of unsound mind, and the persons beneficially entitled petitioned in Lunacy for an order vesting the right to transfer the stock and receive the dividends in them, Lord Justice James said (*Ib.* p. 94):—

"You are asking us to administer a trust in Lunacy, which it is our settled rule never to do. We, therefore, cannot make the order asked. But as affidavits have been made showing that the petitioners are proper persons to be appointed new trustees, we can make an order appointing them new trustees of the settlement, and vesting the right to transfer the funds in them as such trustees,

upon the petition being amended for that purpose, and intituled in the Chancery Division as well as in Lunacy."

When trustee of stock refuses to transfer.

23. And be it enacted, that where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

Sole trustee may mean all the trustees.

In *Re Hyatt's Trusts* (21 Ch. D. 846) the trustees of a settlement made in 1880 refused to act, and in 1882 new trustees were appointed under a power. The original trustees refused to transfer the trust fund to them, and an order vesting the trust property in the new trustees was made, but the bank refused to act upon the order on the ground that this section only applies to "a sole trustee" refusing to act.

"The bank says that the words 'any sole trustee' apply only to the case of one trustee, and not to that of two or more joint trustees. But that argument is answered by the interpretation clause. The question came before the Vice-Chancellor Parker in 1851 in the case of *Re Hartnall* (5 De G. & Sm. 111). . . . He said that 'it was a strange application of the interpretation clause to hold *sole trustee* to mean *all the trustees* when there were more than one,' but on the whole he thought it correct. . . . It is said that the same point came before Vice-Chancellor Stuart in *Re Spawforth's Settlement* (12 W. R. 978; 10 L. T. N. S. 641), where there were two trustees, both of whom refused to transfer, and the Vice-Chancellor no doubt said that he had no jurisdiction to make the order. It appears, however, from the report of the case in the Law Times that the then existing trustees were only the executors of a deceased surviving trustee, and it is not perfectly clear that the fund stood in the sole name of the last trustee, and it also

appears that the title of the *cestuis que trust* to receive the fund was disputed on the ground that there was litigation pending in which the petitioners were interested, and for the costs of which the fund might be liable. It is very probable, therefore, that the Vice-Chancellor refused to make the order on that ground. At any rate I shall follow the previous decision of Vice-Chancellor Parker; and I wish also to state that I consider his view of the construction of the Act to be right. There are several sections in the Act, such as nine and eleven, where the word 'solely' occurs, and I think that the intention of the framers of the Act was that the word 'sole' should be sufficient to include all trustees who were solely entitled to any trust property." (Per Chitty, J., 21 Ch. D. 849.)

Persons who have been duly appointed new trustees are "absolutely entitled" within this section (*Ex parte Russell*, 1 Sim. N. S. 404), but a tenant for life is not, nor is one of two trustees. (*Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338.)

In *Re Mount* (24 L. T. N. S. 290), Mount was the sole trustee of a sum of 3,333*l.* 6*s.* 8*d.* consols upon the trusts of a marriage settlement under which the husband, on the death of his wife without issue, had become absolutely entitled to the fund. Mount, although notice to transfer the fund was given him, neglected to do so. It was held to be unnecessary to serve him with a petition for the transfer of the fund and for vesting it in the husband, or for the purpose of obtaining a preliminary order under the fourth section of the Act of 1852.

This section gave the Court no authority to make a vesting order with regard to stock held by an infant sole trustee who was out of the jurisdiction. (*Cramer* v. *Cramer*, 5 De G. & Sm. 312.) Authority to do so, however, is given by sect. 3 of the Act of 1852 (*post*, p. 107).

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

24. And be it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or

income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

See *Re White* (L. R. 5 Ch. 698, *ante*, p. 12).

Jurisdiction.

In *Re Nicholl* (18 W. R. 443), one of the executors of the surviving trustee of a settlement was lunatic, and the other two refused to transfer to the persons absolutely entitled. Lord Justice Giffard thought that the refusal of two of the executors could not have given the Court jurisdiction, even if the third had been *sui juris*, and, therefore, that a petition must be presented in Lunacy.

Refusing trustee need not be served.

Where a trustee has refused or neglected to transfer stock, &c. after a request in writing has been made to him, it is not necessary that the petition should be served upon him.

Thus, in *Re Baxter* (2 Sm. & G. App. 5), the Court made a vesting order where a trustee refused to convey certain shares to new trustees duly appointed and notice to do so under this section had been given him, although the petition was not served upon him.

It was not necessary, under the former Trustee Acts (10 Geo. 4, c. 56; 11 Geo. 4 & 1 Will. 4, c. 60), to serve such a trustee. (*Ex parte Armstrong*, 16 Sim. 296.)

When stock is standing in the name of a deceased person.

25. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof in any person or persons whom the said Court may appoint.

See *Re Dickson* or *Dixon* (W. N. 1872, p. 223; 21 W. R. 220), *ante*, p. 32.

Personal representative, who is.

In *Re Ellis* (24 Beav. 426), this was held to apply to the case of the executor of a surviving trustee who had not proved the will; in *Re Stroud* (W. N. 1874, p. 118), a vesting order was made on F.'s refusal to transfer for twenty-eight days after notice, although the registrar objected that F.'s right to representation only arose from her being one of the next of kin of the person whose estate was required to be represented.

Effect of an order vesting the legal right to transfer stock.

26. And be it enacted, that where any order shall have been made under any of the provisions of this Act vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition

of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

Under this section and sect. 6 of the Trustee Extension Act, 1852, where trust funds were invested on unauthorized securities, an order was made for the appointment of new trustees with the right to call for a transfer of the funds to themselves, or any purchaser or purchasers, the trustees undertaking to hold the proceeds on the trusts of the settlement. (*Re Peacock*, 14 Ch. Div. 212.)

Effect of an order vesting legal right in a chose in action.

27. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

28. And be it enacted, that whensoever, under any of the provisions of this Act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of

Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

Consent of lord not necessary where trustees disclaim.

The consent of the lord to a vesting order is only necessary when the estate in them has actually descended, but not where a trustee disclaimed from the first, and has never been admitted.

Thus in *Re Flitchcroft* (1 Jur. N. S. 418), where the original trustees of a settlement declined to act, copyholds were directed to vest in trustees appointed by the Court, without the parties being required to get the lord's consent. Wood, V.-C., made the order in these words, "Vest in the new trustees all the estate which would have vested in the originally named trustees, if they had accepted the trust."

Copyholds vested without lord's consent where trustees disclaim.

In *Paterson* v. *Paterson* (L. R. 2 Eq. 31), P., a trustee of copyholds, devised them to S. (who was not his customary heir), and died. S. disclaimed. An order was made appointing B. a trustee in the place of P., and vesting in him all the estate that would have vested in S. if he had accepted the devise in P.'s will. The lord of the manor petitioned against the order, it having been made without his consent, but it was held, without prejudice to the question if the lord was entitled to a double fine, that the order was in proper form, and rightly made without the lord's consent.

Lord Romilly, though he declined to decide whether the lord was entitled to a double fine or not, says (*Ib.*, p. 36), "I am rather disposed to think that the view Mr. Williams stated is the correct view, that in substance the copyholds descended to the heir subject to the right of the devisee to be admitted, there being no beneficial interest whatever in the heir, and when the tenant of copyholds has devised the land so that it descends to the heir subject to the right

of admission of the devisee, the Court has full power to substitute another person instead of the devisee."

In *Bristow* v. *Booth* (L. R. 5 C. P. 80), the question whether the lord was entitled to two fines was answered in the negative. Lord only entitled to a single fine.

Bovill, C. J., after reading this section, said (*Ib.* p. 92):—"The inference sought to be drawn from that section is, that when the lord does not consent to the appointment of the trustee by the Court, the trustee so appointed must take admittance. But it is to be observed that the section says nothing about any fine being due, and had it not been for the implication arising from sect. 28, I should have thought that, by force of the other sections I have referred to (Trustee Extension Act, 1852, ss. 9 and 12; and Trustee Act, 1850, s. 34), the estate would have vested in the newly-appointed trustee without admittance. The admittance is to be of the person appointed by the Court of Chancery. Upon the admittance the lord may be entitled to a fine; and the defendant is willing to pay, and has actually tendered one fine. I cannot discover in the statutes no implication of a right in the lord to any other fine. Mr. Archibald contends that such an implication does arise from the latter part of sect. 28 of the Act of 1850, which provides that the lord shall, 'subject to the customs of the manor and the usual payments,' be bound and compellable to make admittance to such lands, &c. That part of the section, however, applies where the order is not a vesting order, but an order for another person to convey; which is not this case. That part of the section, therefore, clearly has no application here; and it is unnecessary to determine whether or not two fines would be payable under such circumstances. We are asked to hold that two fines are payable where the order is, as here, an order to vest the estate in the person appointed a trustee. That construction, however, I conceive not to be warranted either by the letter or the spirit of the Act. . . . There being nothing more in the Act than I have adverted to, and the case not being brought within any custom of the manor, there is nothing to warrant a claim by the lord of two fines."

In *Re Howard* (3 W. R. 605), it was held that where the legal estate in copyholds had actually descended, the consent of the lord to a vesting order was necessary, and Wood, V.-C., said, "As the deceased trustee had been admitted, and the legal estate had actually descended, the consent of the lord was necessary. In the case cited (*Re Flitchcroft*, *supra*), the person named as heir had probably disclaimed from the first, and never been admitted." Lord's consent where necessary.

And in *Cooper* v. *Jones* (25 L. J. Ch. 240), where copyholds had been sold by order of the Court in a suit by an equitable mort-

gagee against the infant customary heir, who had not been admitted, and the personal representative of the deceased mortgagor, the consent of the lord, evidenced either by his appearing and consenting, or by a verified certificate of his consent, was held to be a necessary preliminary to the drawing up of a vesting order under the Trustee Act made upon the petition of the purchaser, the infant heir, and the personal representative of the mortgagor.

How consent should be given.

It is not necessary for the lord of the manor to appear in Court to consent to a vesting order under this section, the proper method of signifying his consent being by a verified certificate of his consent.

In *Ayles* v. *Cox* (17 Beav. 584), Lord Romilly held that the proper person to apply for a vesting order under this section was the purchaser, but that all costs should be borne by the vendor, except those occasioned by the appearance of the lord of the manor. ("I have already decided that the appearance of the lord of a manor to consent is not necessary.")

In *Re Godfrey* (23 Ch. D. 205), the sole trustee of copyholds held in trust for A. B. absolutely, died intestate, and without an heir. A. B. presented a petition under this Act, asking that the property might be vested in himself.. Mr. Justice Chitty said, "You may take the order. I think I have jurisdiction to make it under the combined effect of sects. 15 and 28."

Order may be enforced by mandamus.

The decision in *R.* v. *Pitt* (10 A. & E. 272) is overruled by this section, and the Court will, by mandamus to the lord of the manor, give effect to an order of the Court of Chancery appointing a person to convey copyholds under sect. 20. (*Re Lane*, 12 W. R. 710.) "The Legislature appears to have had *R.* v. *Pitt* in contemplation in passing the later Act, and to have met the difficulty by the words of sect. 28, 'that the lord shall be bound and compellable to make admission.'" (*Ib.*, per Blackburn, J.)

Form of order.

In *Re Heys* (9 Hare, 221), the form of order appointing a new trustee of copyhold estate, and appointing a person to complete the assurance to such new trustee, was—

"This Court doth order that Thomas Rawstron, of, &c., be appointed trustee of the will of James Heys, deceased, dated the 26th of January, 1830, in substitution for and in the place of J. B. and W. R., both deceased. And it is ordered, that the copyhold hereditaments and premises devised by the said testator's will, and now remaining unsold, do vest in Thomas Rawstron, for such estate and interest as the said J. B. and W. R., if living, would have, or as the said T. T. R., the customary heir of the said W. R., deceased, now has therein. And the said T. T. R. declining to act in the

execution of the trusts of the will of the said T. Heys, it is ordered that W., of , in the place of the said T. T. R., do all such acts as may be necessary to vest the said copyhold estate in the said Thomas Rawstron."

When a decree is made for sale of real estate for payment of debts.

29. And be it enacted, that when a decree shall have been made by any Court of Equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

In *Weston* v. *Filer* (5 De G. & Sm. 608) a testator devised his residuary estate to his daughter and granddaughter successively for life, and, after the death of the survivor, directed it should be divided equally among the children of his granddaughter who should attain twenty-one. A suit was instituted, and an order was made directing payment of the costs by a sale of part of the property. A petition on behalf of the two children then born to the granddaughter, that their rights and those of after-born children might vest in the purchaser of the lots, failed, the Vice-Chancellor being of opinion that neither this section nor sect. 30 applied, and that the infant petitioners were not constructive trustees. But see now the Trustee Act, 1852, s. 1, *post*, p. 103.

"In sect. 29, the obtaining a decree for sale for the payment of debts of a deceased person is treated as a condition precedent. So, in sect. 30, a decree for specific performance or conveyance is made a condition precedent. The 1st section of the Act of 1852 provides for the case where an order has been made for the sale of lands for any purpose whatever. The Legislature appears to me to have meant that, in cases of contract, the Act in general should only apply where there has been a decree or order on which the right is founded." (*Re Colling*, 32 Ch. Div. 333, p. 336, per Fry, L. J.)

In *Wood* v. *Beetlestone* (1 K. & J. 213) copyholds which were devised to an infant for life, with remainder to his first and other sons in tail, were decreed to be sold for payment of debts, and an order was made in the cause, and pursuant to 1 Will. 4, c. 47, that

the guardian of the infant should surrender them to the purchaser. Vice-Chancellor Wood held that the purchaser was entitled to require an order discharging the contingent rights of the infant's unborn children under this section. He says (1 K. & J. p. 215):—

"The Act of 1 Will. 4, c. 47, in the case of a sale of real estate for payment of the debts of a deceased owner, gives certain powers to the persons who wish to sell when the parties entitled to the property are otherwise unable to convey the fee simple. In the case of the fee simple being vested in the infant, by sect. 11 the Court may compel him to convey, and such conveyance will be valid. Where the estate has been devised to one for life, not saying to an infant for life, the tenant for life by sect. 12 is empowered to convey the whole fee simple. Then the Trustee Act, 1850, provides that whenever the Court has power to direct a party to convey, and such party is an infant, they may direct some one else to convey for him. I think it too doubtful for me to hold that when an infant only has a statutory power under the 1 Will. 4, c. 47, a person appointed to convey for him under the Trustee Act, 1850, can exercise that power. The words of the 20th section of that Act are larger than I thought at first, and do not in terms limit the effect of such conveyance to passing only the estate vested in the infant; but as the title is capable of being made clear in this case by discharging the contingent right of other parties under sect. 29, I think this is the proper course to take, and I cannot force the purchaser to take a conveyance on any other terms. The purchaser is entitled to his costs out of the fund in Court."

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

30. And be it enacted, that where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was

during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn.

Contract for sale, vendor not a trustee,

In *Re Colling* (32 Ch. Div. 333) the facts were these. By an order under the Lunacy Regulation Act, 1862, the guardians of the poor of N. were authorized to sell a freehold belonging to Ann Colling, a person of unsound mind, receive the purchase-money, and execute a conveyance. The property was sold in May, 1885, the sale to be completed in November. The abstract was delivered, and no objection was taken to the title. On the 28th of June, Ann Colling died, and the guardians presented a petition, asking that she might be declared a trustee within the meaning of the Act, and that their clerk might be appointed a trustee of the property, and the estate vested in him in trust to complete the sale. It was held, however, that Ann Colling could not be held a trustee within the Act, and that the order could not be made.

"The application," said Cotton, L. J. (*Ib.* p. 335), "is one under the Trustee Acts, asking for a vesting order as to land, on the footing that Ann Colling, at her death, was a trustee of it. An order for sale of the land had been made in lunacy, a contract for sale was entered into, and a deposit paid; but before the residue of the purchase-money had been paid the lunatic died. We were pressed with a decision of the late Master of the Rolls in *Lysaght* v. *Edwards* (2 Ch. D. 499), where, after a contract for sale had been entered into, the estate was held to pass under a devise of trust estates, but the question in that case was quite different from that in the present. Where a contract for sale has not been completed in the lifetime of the vendor, can he at his death be considered a trustee? To hold that he can would be a dangerous departure from the rules on which the Court has been in the habit of acting. The case which furnishes the best guide to a decision is *Re Carpenter* (Kay, 418, *post*, p. 98), where Lord Hatherley, when Vice-Chancellor,

refused to make an order under circumstances very similar to those of the present case, and said that he could not do it unless the right to specific performance had been settled by a decree. It is difficult in an application of this kind to enter satisfactorily into the question whether the circumstances are such that specific performance would have been enforced. . . . We were referred to a case before Lord Romilly (*Re Russell*, 35 L. J. Ch. 461), where he made a vesting order, guided, I think, by the special circumstances that the purchaser in that case had the power of taking the land compulsorily. I do not think that correct in principle. In *Re Cuming* (L. R. 5 Ch. 72) Lord Justice Giffard held, and we have since followed the decision, that if the purchase-money is paid to the vendor in his lifetime he becomes a trustee of the legal estate. Here the purchase-money has not been paid . . . and, though I regret it, I think we have no power to deal with this case under the Trustee Acts."

unless the purchase-money has been paid.

The decision in *Re Lowry* (L. R. 12 Eq. 78, where an owner who had contracted to sell lands, which they had power to take, to a railway company, died after devising the lands to an infant, who was declared a trustee under this Act) would seem only capable of being supported if the order was made by consent. (Dart, 6th edition, Vol. II., p. 667, n.)

Executed contract.

In *Re Bradley* (34 W. R. 148) a wife on her marriage settlement covenanted to surrender copyholds to the use of the settlement, but, although the marriage was solemnized, never did surrender them, and on her death they vested in her youngest child as customary heir. On a petition for a vesting order in the trustee without surrender or admittance for all the estate of the customary heir, Mr. Justice Chitty said, "I think that the marriage having been solemnized the Court can make the order, as the case becomes one of an executed contract, as in *Re Cuming*, 5 Ch. 72."

Does not apply to infant heir of mortgagor.

This section "ought to be held to apply to all cases where there is judgment against an infant for an immediate conveyance, but that is not the form of the judgment for foreclosure in the case of an equitable mortgage." But *Backhouse* v. *Hornsey* is an express decision that sect. 30 does not apply to the case of an infant heir of a mortgagee, even where the mortgage is legal. See the judgment of Mr. Justice Kay in *Mellor* v. *Porter* (32 W. R. 271; *ante*, sect. 7, p. 16).

Partition Acts.

"In a decree for partition under the Partition Acts, the practice seems to be to direct a conveyance at once by an infant defendant, and then to declare him a trustee without giving him a day to show cause." (*Ib.*, p. 272; cf. *Bowra* v. *Wright*, 4 De G. & Sm. 265.)

In *Lees* v. *Coulten* (L. R. 20 Eq. 20), where real estate was held

by a complicated title, under which the parties interested were very numerous, and unborn issue might become entitled to legal estates, a decree for sale was made, and a declaration made that the several parties to the cause, and unborn persons who might claim under the will in the bill mentioned, would, upon the sale or payment of the purchase-money, be trustees within the meaning of the Trustee Act.

In *Basnett* v. *Moxon* (L. R. 20 Eq. 182) an undivided share of real estate stood limited in remainder after certain life estates and estates tail to the right heirs of A. A decree for sale was made in a suit to which A. was a party under the Partition Act, 1868. It was held that the interests of the persons who, on the death of A., would become his right heirs were bound in equity by the decree, and that they were "unborn" persons within the meaning of this section; "unborn" here meaning "non-existent," that is, non-existent in the character to entitle a person to the property in question. (*Ib.*, p. 185, per Jessel, M. R.)

In *Shepherd* v. *Churchill* (25 Beav. 21) the shares of parties to a partition suit being minute and complicated, each was declared a trustee as to the shares allotted to the others, and a person was appointed to convey to each party his allotted share.

A lunatic may be declared a trustee of land sold under an order of the Court, and in such a case a vesting order may be made under sect. 1 of the Trustee Extension Act, 1852, without an application in lunacy. (*Herring* v. *Clark*, L. R. 4 Ch. 167, *post*, p. 104.)

Execution of lease.

In *Hall* v. *Hale* (51 L. T. N. S. 226) Mr. Justice Kay held (notwithstanding *Grace* v. *Baynton* (25 W. R. 506)) that, where a decree for specific performance of an agreement to execute a lease had been made, the Court had power under this section to declare him a trustee and appoint a person to execute the lease in his place.

47 & 48 Vict. c. 61, s. 14.

By the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14, the Court has now jurisdiction to appoint a person to execute a lease in such a case.

In *Re Edwards* (33 W. R. 578) a defendant refused to obey an order directing him to execute a mortgage, and Mr. Justice Pearson appointed his chief clerk to execute it under the Judicature Act, 1884, s. 14. And a similar order was made where a respondent after a decree absolute refused to execute a deed securing maintenance to the petitioner. (*Howarth* v. *Howarth*, 11 P. D. 68; 11 P. Div. 95.)

Power.

In *Ex parte Mornington* (4 De G. M. & G. 537) a donee of a

power of jointuring under a settlement was ordered in a suit for specific performance to exercise the power by a deed approved of by the master securing a jointure to his wife. On his refusal to obey the order, he was declared a trustee of all his interest under the settlement, and the Court appointed a person to execute the deed.

Power to make directions how the right to transfer stock to be exercised.

31. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

Payment into Court.

In *Re Parby* (29 L. T. 72) Vice-Chancellor Kindersley held that there was no jurisdiction to order payment of money into Court.

In *Re Mais* (16 Jur. 608; 21 L. J. Ch. 875) a sum of consols, the property of four infants, was vested in two trustees, one of whom was resident in Jamaica. A petition was presented for the appointment of a fresh trustee in his stead, and that the trustees might be appointed guardians, and authorized to raise a sum for the maintenance and education of the infants. Vice-Chancellor Kindersley declined to appoint a new trustee, but appointed guardians, and directed the sum required for maintenance to be sold out. The bank declined to act on the order, and the fund was in consequence transferred into Court under the Act, and the sum ordered to be paid out by the Accountant-General under the order.

In *Re Thornton* (9 W. R. 475) a trustee of residue transferred a sum of residue into his own name, and permitted his *cestui que trust* to receive and appropriate the dividends for a long series of years under a power of attorney. The trustee died without earmarking the fund, and the next of kin refused to meddle. It was held that there was sufficient evidence to entitle the *cestui que trust* to have the money paid into Court, and to have an order directing payment of dividends to her until further order.

Disputed title not decided on petition.

But the Court will not, on a petition under this Act, decide a disputed question of title. (*Re Draper*, 9 W. R. 805.)

In *Re Dawson* (3 N. R. 397), where a trustee was incapable, from ill-health, of the exertion of signing the necessary papers for a

transfer into Court of a sum of stock, new trustees were appointed on their undertaking to transfer the fund into Court.

In *Re Pitt* (1 Jur. N. S. 1115) a grandmother brought a suit to have a grandchild (in whose name jointly with her own she had invested money) declared a trustee, and the bill was dismissed after the grandmother's death. An order having been made on petition directing payment of the costs of the defence out of the fund, to which objection was made in the registrar's office, Vice-Chancellor Stuart, being satisfied the infant was absolutely entitled, had the petition entitled in the matter of the Trustee Act, and then directed the fund to be brought into Court, a sufficient sum raised for the payment of costs, and the dividends of the remainder accumulated for the infant's benefit.

Power to Court to make order appointing new trustees.

32. And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees.

Cases of Expediency.

Corporation which has ceased to exist.

Under this section trustees may be appointed of a fund standing in the name of an incorporate body which has ceased to exist.

Thus, in *King of Hanover* v. *Bank of England* (L. R. 8 Eq. 350), a suit having been instituted by the King and Crown Prince of Hanover against the Bank of England and the Dukes of Cambridge and Brunswick, praying that the Bank might be directed to transfer 600,000*l.*, standing to the credit of "the Lords of his Majesty's Royal Regency of Hanover," into the names of the plaintiffs and the last two defendants; the Court directed the decree to be intituled in the matter of the Trustee Act, 1850, appointed two trustees of the fund, and empowered and directed them to transfer it.

Infant.

In *Re Gartside* (1 W. R. 196) a new trustee was appointed in the place of an infant who had some beneficial interest.

In *Re Porter* (2 Jur. N. S. 369) a testator devised property to two trustees, one of whom was an infant, upon trust to sell. The Court appointed a person trustee in the place of the infant, and vested the estate in the new jointly with the adult trustee.

In *Re Skelmerdine* (33 L. J. Ch. 474), where the Court appointed

a new trustee in the place of an infant trustee nominated by a testator, the order was made without prejudice to any application by the infant to be restored to the trusteeship when of age.

Not expedient if application to Court unnecessary.

Application should not be made to the Court where the power given by the Conveyancing Act, 1881, can be exercised.

In *Re Gibbons* (W. N. 1882, p. 12) a surviving trustee and the *cestui que trustent* under a will petitioned for the appointment of an additional trustee. The petition was prepared in July, 1881, but not presented until January, 1882, when the Conveyancing Act, 1881, had come into operation. Under the circumstances Mr. Justice Kay made the order, but said, "It must be understood that, as a general rule, petitions for the appointment of new trustees ought not to be presented when the power given by the Act of 1881 could be exercised." (Cf. *Re Oakden*, 26 Sol. Journ. 563, *post*, p. 88.)

"Sect. 31 of the Conveyancing Act authorizes the continuing trustees to appoint new trustees, without any consent, unless a contrary intention is expressed. A case in which the power does not apply is a state of circumstances in which no intention is expressed one way or the other." (*Cecil* v. *Langdon*, 28 Ch. Div. 1, per Lindley, L. J., p. 6.)

Thus, where a power of appointing new trustees of real estate was given to the continuing trustees of real estate, with the consent of the tenant for life or in tail, the tenant in tail being an infant, a continuing trustee was entitled to appoint persons of whom the beneficiaries disapproved. (*Ib.*)

And the power given by that Act applies to a case where the husband and wife are donees of a power of appointment if they are unable to agree. (Per Stirling, J., *Re Sheppard*, W. N. 1888, p. 234.)

Composition deed.

New trustees of a composition deed for the benefit of creditors may be appointed under the Act. (*Re Price*, L. R. 6 Eq. 460; *Re Raphael*, 9 Eq. 223; cf. *Re Donisthorpe*, 10 Ch. 55.)

It is "expedient to appoint" new trustees where there is a difficulty in obtaining administration to a deceased trustee.

Difficulty in obtaining administration.

In *Davis* v. *Chanter* (6 W. R. 416), an application was made for the appointment of new trustees in 1858, the last surviving trustee having died in 1799. Vice-Chancellor Kindersley said sect. 9 of the Trustee Extension Act, 1852, was passed in consequence of the conclusion arrived at in *Re Hazeldine* (16 Jur. 853), that sect. 32 of the Act of 1850 did not apply where there were no existing trustees. "The last trustee died so far back as 1799, and no doubt it would be possible to obtain administration to him, limited to the object which was sought to be obtained, by the appointment of a new

trustee; but no doubt that would be attended with great difficulty and some expense, therefore it was a case where it was expedient to appoint a new trustee. In the case before Lord Justice Turner there was nothing approaching to a necessity for appointing a trustee; it was this simple case—where a trustee had died and no one had taken out administration to him. This case came within the meaning, and, indeed, within the express terms, of the 9th section.

In *Re Frost* (20 L. J. Ch. 112; 15 Jur. 664) a petition was presented for the appointment of new trustees where no representation in England had been taken out to the last surviving trustee, and Vice-Chancellor Knight-Bruce declined to make an order.

Trustees may be appointed though receiver continued.

In *Reeves* v. *Neville* (10 W. R. 335) the trustees of a will were dead, and there was a question as to the party in whom the legal estate in the trust property was vested. New trustees were appointed although a receiver had been appointed in a suit, and the receiver was continued.

Incapacity of donee.

Where parties in whom the power of appointing new trustees was vested were in India, and had appointed two new trustees in the place of two trustees who had disclaimed, not knowing that the third trustee had also disclaimed, a new trustee was appointed. (*Re Humphry*, 1 Jur. N. S. 921.)

In *Re Somerset* (W. N. 1887, p. 122) the donees of a power of appointing new trustees of a settlement were the husband and wife. The wife obtained a judicial separation, and the husband was permanently resident in Australia. On the petition of the wife and children for the appointment of new trustees in the place of a deceased trustee and one desirous of retiring, Mr. Justice North held that under the circumstances it was inexpedient or difficult to appoint new trustees without the assistance of the Court, and that sect. 32 applied.

As to incapacity from age, see *Re Lemann* (22 Ch. D. 633).

Donee lunatic.

In *Re Sparrow* (L. R. 5 Ch. 662) a testator devised estates in strict settlement, and directed that the person in actual possession of the rents and profits should have the power of appointing new trustees. The eldest son who would have the power was a lunatic. On a petition being presented for the appointment of new trustees, the case was referred to the Court of Appeal. Their lordships said that the Court was not exercising any power given to a lunatic, but was exercising a statutory power. Suppose that the committee did not choose to apply, there must be jurisdiction in the Court to appoint a new trustee. Their lordships made the order in *Chancery*. (*Re Sparrow* was followed in *Re Heaphy*, 18 W. R. 1070.)

By the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), ss. 136 and 137, the committee of a lunatic donee of a power of appoint-

ment of new trustees may appoint; and, by sect. 138, trustees so appointed have all powers as if they had been appointed under the Trustee Act, or in a suit.

In *Re Bowmer* (3 De G. & J. 648) a petition for the exercise of a power of appointment of new trustees vested in a lunatic was presented by his committee. The form of order was—

"We do order that the said I. B., as the committee of the estate of the said G. B., exercise the power of appointing new trustees vested in the said G. B. by the said indenture of the 16th of June, 1848, by appointing the said A. S. and S. R. trustees of the same indenture, and that it be referred to the Master in Lunacy to settle and approve of a proper deed for the appointment of the said trustees, and that the said deed, when so settled and approved of, be executed by the said committee in the name and on behalf of the said G. B.: And we do order that the right to sue for, recover, and receive the sum of 1,000*l.* deposited in the bank of, &c., to the credit of, &c., be vested in the said A. S. and S. R. on their appointment as such trustees as aforesaid, and be, when received by them, held, subject to the payment of the costs hereby directed to be taxed, upon the trusts of the said indenture of settlement. Direction for taxation of costs of application and payment thereof out of the trust moneys."

Power insufficient.

In *Re Armstrong* (5 W. R. 448) the power to appoint new trustees only contained the words "die, or decline, or become incapable to act," and a trustee who had acted was anxious to retire. A new trustee was appointed in his place under this Act.

And in *Re Woodgate* (5 W. R. 448) new trustees were appointed in the place of two who had acted, but desired to be discharged, where the power to appoint new trustees only contained the words "shall die or become incapable or unwilling to act."

No existing Trustees.

If trustees of will die in testator's lifetime, heir of testator to be served.

Under this section and sect. 9 of the Extension Act the Court has jurisdiction to appoint new trustees of a will in the place of those appointed by a testator, when all the trustees appointed by the will have died in the testator's lifetime, if the heir has been served.

Thus, in *Gunson* v. *Simpson* (L. R. 5 Eq. 332), where a testatrix had devised real estate to A. on trust for sale, and A. died in her lifetime, and it was not known who was heir to the testatrix, it was held that there was no jurisdiction, in the absence of the heir, to appoint a trustee and make an order vesting in him the descended real estate. But in *Re Smirthwaite's Trusts* (L. R. 11 Eq. 251), where a testator in 1838 devised all his real and personal estate to A., B., and C. upon trust to sell and purchase other estate to be

held on certain trusts, and outlived A., B., and C., and died in 1870 possessed of freehold, copyhold, and personal property, on the petition of the tenant for life and the first tenant in remainder for the appointment of new trustees and a vesting order, the heir-at-law and customary heir having been served, the order asked was made by Malins, V.-C.

The Conveyancing Act, 1881, s. 30 (repealed as to copyholds by the Copyhold Act, 1887, s. 45), vests trust and mortgage estates vested in a person solely in his legal personal representatives, notwithstanding any testamentary disposition.

In *Re Williams* (36 Ch. D. 231) a testator devised his real and personal estate to David Williams upon certain trusts, and his will contained no power of appointing new trustees. In 1865 David Williams died intestate, leaving Mary Jenkins his heiress-at-law. In 1882 she died intestate, and the petition for appointment of new trustees and for a vesting order was served on her heir-at-law, there being no legal personal representative of Mary Jenkins; and North, J., felt no difficulty in making an order vesting the property in the new trustees for all such estate as was vested in Mary Jenkins at the time of her death.

Trustees appointed in place of constructive trustees.

In *Re Davis* (L. R. 12 Eq. 214) it was held, that a constructive trusteeship of stock, within the meaning of that term as used in the Acts, might be recognized, and trustees of a will appointed, so far as regarded such stock, in the place of the constructive trustee.

And in *Re Gillett* (25 W. R. 23) trustees were appointed of a will by which property was limited in a manner contemplating the intervention of trustees, although none had been appointed by the testator.

Disclaimer.

New trustees of a will may be appointed where the trustees named in the will have disclaimed. (*Re Tyler*, 5 De G. & Sm. 56; *Re Sheppard*, 32 L. J. Ch. 23; 11 W. R. 60.) And where a man made a voluntary settlement of real estate without communicating it to the trustee in his lifetime, and the trustee disclaimed, new trustees were appointed. (*Jones* v. *Jones*, 31 L. T. N. S. 535.)

In *Re Martinez* (22 L. T. N. S. 403) the executors and trustees of a naturalized British subject disclaimed, and on the petition of the administrator and the persons who, if not aliens, would have been co-heirs-at-law, new trustees were appointed, the Crown not objecting. (Cf. *Re Giraud*, 32 Beav. 385.)

(Since the enactment of 33 & 34 Vict. c. 14, s. 2, aliens have been enabled to hold property.)

A vesting order cannot be made where the Crown has a beneficial interest, but application should be made under 47 & 48 Vict. c. 71. (*Re Pratt*, 34 W. R. 757.)

Validity of Instrument not considered.

Validity of instrument not considered.

The Court will appoint new trustees without entering into the question of the validity of the instrument.

Thus, on a petition for the appointment of new trustees of a separation deed in the place of a sole trustee who had died, although the deed contained a provision that the custody of the children should be given to the mother, new trustees were appointed (*Re Matthews*, 26 Beav. 463), Romilly, M. R., saying, "It is clear that I must appoint new trustees. No question as to the validity of the deed arises now. This is a deed by which certain property was placed in the hands of a trustee for specified purposes. He is dead; and I am asked to appoint new trustees to protect the property. I am bound to appoint them; but in doing so, I do nothing in any degree affecting the rights of any parties, whether the deed be bad or good. Fully admitting the authority of *Hope* v. *Hope* (5 W. R. 387), and *Vansittart* v. *Vansittart* (6 W. R. 386), I express no opinion as to the validity of the deed, but I simply appoint trustees to protect the property of the persons entitled, whether claiming under the deed or against it." (Cf. *Att.-Gen.* v. *Ward*, 6 Hare, 477.)

Separate Sets of Trustees.

Separate trustees may be appointed where only one set of trustees were originally appointed. Thus, in *Re Grange* (29 W. R. 502; 44 L. T. N. S. 469), a testator gave freehold and leasehold estates on trust for several classes of persons, with cross remainders. Many *cestui que trusts* were not *sui juris*; but all who were, and the original trustees, consented to the appointment of separate sets of trustees. Mr. Justice Fry said: "The case of real estate is somewhat different from that of money funds, but *Re Dennis* (12 W. R. 575) is a case of real estate. I think that, notwithstanding the cross remainders, and considering the consents given and the state of the families, I can make the order, following authority."

And cf. the Conveyancing Act, 1882, s. 5 (45 & 46 Vict. c. 39); *Re Moss* (37 Ch. D. 513); *Re Cotterill* (W. N. 1869, p. 183); *Re Cunard* (48 L. J. Ch. 192; 27 W. R. 52); *Re Hetherington* (34 Ch. D. 211).

"In *Savile* v. *Cowper* (36 Ch. D. 520), Mr. Justice North held that, under the powers given by sect. 5 of the Conveyancing Act, 1882, trustees are not at liberty without the authority of the Court to retire from one part only of the trusts and appoint new trustees of that part to act in their place. But that is a very different thing from an appointment with the authority of the Court under the Trustee Acts." (*Re Moss*, 37 Ch. D. 513, p. 516, per Kay, J.)

This section gives no jurisdiction to *remove* a trustee desirous of continuing to act. Trustee not removed,

The facts in *Re Blanchard* (3 De G. F. & J. 131) were as follows:—The trustee of a deed was an insolvent solicitor, and the *cestui que trustent* presented a petition alleging misconduct, and that the trustee would not act, and asked for the appointment of a new trustee and a vesting order. The trustee denied the allegations, and offered explanations. Lord Justice Turner said (*Ibid.*, p. 135), "With regard to the jurisdiction under the Trustee Acts, the case, I think, wholly depends on the 32nd section of the Act; for although it was attempted in argument to bring the case within some of the earlier sections, which provide for the case of trustees refusing to do certain acts, it is clear that the preliminaries required by those sections were not observed, and the case therefore cannot be brought within the enactments. It is to be observed, too, that these earlier sections do not extend to the appointment of new trustees, but merely provide the means of doing the acts the trustee has refused to do. Looking then to the 32nd section of the Act, was it intended to extend to displacing trustees who were desirous to continue in the trust, and appointing others, on the ground of alleged misconduct in the trustees to be displaced, which is the case before us? I think not. The language of the section, though no doubt very general and extensive, does not appear to me adapted to such cases. It is 'whenever it shall be found expedient,' words which seem to me to import that the section was meant to apply to cases in which there might be a question of expediency. But there could scarcely by possibility be any case of a continuing trust (and it is to such trusts the section applies), in which it would not be expedient that a delinquent trustee should be removed, and a new trustee appointed in his place. Whatever doubt, however, there might be upon the very general words of the section, seems to me to be removed by the context of the Act. At the time when this Act was passed, every trustee had the right to have his accounts taken in this Court in the presence of all the parties interested under the trust, so that all might be bound, and to have any balance which might be found due to him on the result of the account paid (and perhaps in some cases of urgency it might be secured to him), before he was denuded of the trust estate, and, except so far as recent legislation may have altered the case as to parties, I believe every trustee has still such rights. This Act does not profess to alter the right of trustees in these respects, and I see nothing contained in it which in any way indicates any intention to do so; but if the construction of sect. 32, which is contended for, be maintained, it will most

undoubtedly do so, and to a serious extent. How are the rights of displaced trustees to be preserved consistently with sect. 34, which gives the Court power to vest the property in the new trustees; with sect. 36 which provides that neither the appointment of new trustees nor the transfer of property shall discharge former trustees further than they would be discharged by the appointment of new trustees under a power; and with sect. 37, which enables the appointment of the new trustees and the transfer of the property to be made upon the application of any person beneficially interested, whether under disability or not—for although it is, I believe, usual, and certainly it has been our practice in lunacy, upon applications for the appointment of new trustees by persons having partial interests, to require the other persons interested to be served, the Act does not in terms so require, and it has not been unusual to dispense with service upon all parties. Upon these grounds it appears to me, as I intimated in *Hodson's case* (9 Hare, 118), that the 32nd section gave no power to remove the appellant from the trust."

And in *Re Dennis* (12 W. R. 575; 3 N. R. 636; 10 L. T. N. S. 688), where different estates had been vested in the same trustees by one will on different trusts, with only a single power of appointment of new trustees in the usual form, Vice-Chancellor Wood thought the consent of the representatives of the surviving trustee necessary to the appointment of trustees of an estate. (Cf. *Re Grange*, 29 W. R. 502.)

unless he is permanently resident abroad.

But the Court has power under this section to appoint a new trustee, in the place of one permanently resident abroad, without the consent of such trustee, and without his being served with the petition. (*Re Bignold*, L. R. 7 Ch. 223; *Re Stewart*, 8 W. R. 297; *Re Harrison*, 22 L. J. Ch. 69; *Re Martin Pye*, 42 L. T. N. S. 247.)

In *Mesnard* v. *Welford* (1 W. R. 443; 1 Eq. Rep. 237), it was held residence in America for twenty years and establishing a trade there rendered a trustee "incapable" of acting with regard to leasehold property in England.

In *Re Mais* (16 Jur. 608; 21 L. J. Ch. 875), Vice-Chancellor Kindersley declined to appoint a fresh trustee in place of one who was in Jamaica. "He did not think the legislature could have intended a trustee to be removed merely because he was out of the jurisdiction, perhaps only for a short time."

A bankrupt trustee can now be removed.

By sect. 147 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), "Where a bankrupt is a trustee within the Trustee Act, 1850, sect. 32 of that Act shall have effect so as to authorize the appoint-

ment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly."

A similar power was conferred by sect. 117 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). By virtue of that Act a petition was presented in *Coombes* v. *Brookes* (L. R. 12 Eq. 61) in a case where two of three trustees were dead, and the third was an absconding bankrupt. Vice-Chancellor Wickens said, "The Trustee Act, 1850, gave, or was supposed to give, jurisdiction to the Court of Chancery to appoint a new trustee in all cases. Then came the case of *Re Blanchard* (3 D. F. & J. 131), which excepted cases where the old trustee refused to resign. That probably led to the provisions of the Bankruptcy Act, 1869, sect. 117, which authorized the Court to appoint a new trustee in substitution for a bankrupt trustee, whether voluntarily resigning or not. I think, looking at the whole clause and the object contemplated, that the right construction is that the word 'Court' [in sect. 4 of the Bankruptcy Act, 1869] means the Court of Chancery, and that I have jurisdiction to make an order upon this petition accordingly."

Before the Bankruptcy Act, 1869, a new trustee could be appointed in place of a bankrupt only where circumstances, independently of the bankruptcy, would have justified the appointment. (*Re Renshaw*, 4 Ch. 783; *Turner* v. *Maule*, 15 Jur. 761.)

Number.

Number may be increased.

Under this section the Court has jurisdiction to *increase the number* of trustees, although there is no vacancy. (*Re Brackenbury's Trusts*, L. R. 10 Eq. 45.)

In *Re Gregson* (34 Ch. D. 209), a testator appointed his wife, son, and A., trustees of his will. He afterwards revoked this appointment of his wife and son, and appointed his daughter to act jointly with A. He originally gave a power of appointing new trustees to his wife; but he subsequently revoked all gifts and provisions in favour of his wife, so that it was doubtful if the power was subsisting. A petition was presented for the appointment of a third person to act as trustees jointly with the daughter and A., on the ground that sect. 31, sub-sect. 2 of the Conveyancing Act, 1881, only allows the number to be increased on the appointment of a trustee to fill a vacancy. This was assented to by North, J., and he made the appointment under this section.

In *Plenty* v. *West* (16 Beav. 356), where there was a question as

to who should nominate trustees, four were appointed in the place of three. Lord Romilly said: "I think that in this case the Court has power to appoint four new trustees. I have, in two instances, nominated two trustees, though the testator had only appointed one."

And in *Re Boycott* (5 W. R. 15), where the trust property had been considerably increased, on a petition for the appointment of two additional trustees, Vice-Chancellor Wood thought the order might be made under this section, it being expedient under the circumstances to appoint new trustees in addition to the existing trustees.

One trustee not appointed unless special circumstances.

As a general rule the Court will not appoint one trustee only, especially where there were originally more than one. (*Re Ellison*, 2 Jur. N. S. 62.)

But in *Re Reynault* (16 Jur. 233), in the case of a very small estate which was likely to be shortly wound up, where only one trustee had originally been appointed, an order was made appointing one trustee only.

In *D'Adhemar* v. *Bertrand* (35 Beav. 19), a testator appointed the tenant for life and C. D. trustees of property, and there was no power of appointment of new trustees. C. D. disclaimed, and the tenant for life under Lord Cranworth's Act (23 & 24 Vict. c. 145) appointed a new trustee. Lord Romilly, M. R., said: "The Court never commits a trust to the care of a single trustee, even in cases where no more than one was originally appointed. In this case I think the plaintiffs are entitled to have an additional trustee appointed. I also think the Act of Parliament which has been referred to does not take away the jurisdiction of the Court to increase the number of trustees when necessary. If I allowed this lady to appoint a single trustee, she might appoint any person she thought fit, and one who might be very unfavourably inclined towards the other *cestui que trustent*, and thus deprive them of the protection to which they are entitled."

Number not diminished if trust continuing.

Where the original settlor has thought right to protect property by appointing three or more trustees, a less number will not be appointed, except under special circumstances.

Thus, in *Bulkeley* v. *Eglinton* (1 Jur. N. S. 994), on an application for the appointment of two new trustees where three had been originally appointed, Vice-Chancellor Wood said: "The property is very considerable, and the original settlor has thought right to protect it by three trustees. I do not think it right to leave it to two: in the case of the decease of one, the property will be at the mercy of the survivor. I must have clear affidavits as to the

alleged impossibility to find any third person willing to join these proposed trustees."

But in *Re Marriott* (W. N. 1868, p. 215), on a petition for the appointment of new trustees, where there had originally been three, but one was dead, another could not be found, and the third wished to retire because of illhealth, there being a difficulty in finding a third trustee, and, owing to the death of the tenant for life, the only thing remaining to do being to distribute the fund, an order appointing the two trustees was made.

Re Gardiner.

If a bankrupt or lunatic is one of several trustees, the Court will not appoint the solvent or sane trustees sole trustees, but a new trustee must be appointed in the place of the bankrupt or lunatic if the trust is a continuing one.

The authorities were considered by Mr. Justice North in *Re Gardiner's Trusts* (33 Ch. D. 590), where there was a petition, one of three trustees having absconded, and there being great difficulty in getting a third person to act, that the estate might be vested in the solvent trustees alone. "It seems to me I cannot make the order asked for because of the authorities. In the earlier case cited, *Re Stokes' Trusts* (L. R. 13 Eq. 333) a successor to a trustee who wished to retire could not be found, and Lord Romilly held that he could appoint the two continuing trustees to be sole trustees in the place of themselves and the other. A similar case came before the late Master of the Rolls in *Re Harford's Trusts* (13 Ch. D. 135). . . . There is one other case in which an order was made by Vice-Chancellor Malins appointing two trustees of a will, who were willing to carry on a business in place of themselves and a third who was a stranger and desired to retire, and it was found difficult to find a trustee to fill his place. (*Re Tatham's Trusts*, W. N. 1877, 259.) These are all the cases in the petitioners favour. All the other cases from that time on seem to me inconsistent with their having the right to have the number of trustees diminished. First of all, in *Re Nash* (16 Ch. Div. 503) one of three trustees had become lunatic, and the Court of Appeal declined to act in the way I am now asked to act. Lord Justice Cotton says:—'It is not usual to make such a vesting order as that now asked for, although the Court may have jurisdiction to make it under the section that has been referred to, without first requiring a new trustee to be appointed in the place of the lunatic. In my opinion the Court ought not, by vesting the trust property in two only of three trustees, to attempt to do indirectly what it has no power under that Act to do directly, that is, to remove a trustee without appointing another in his place.' The petition stood over on

amendment by asking for a new trustee to be appointed . . . and the parties fortunately were able to get a new trustee.

"The next case is that of *Re Aston* (23 Ch. Div. 217), where also one of the trustees had become lunatic. An unreported case of *Re Colyer* in the Court of Appeal was referred to, in which it appears Lord Justice Cotton had declined to follow the decision in *Re Harford's Trusts* (13 Ch. D. 135). The Master of the Rolls said, 'I adhere to the opinion I expressed in *Re Harford's Trusts*, but as other judges have an objection to make such an order we must decline to make it, otherwise there would be a difference in the practice of the judges of the Court,' and therefore he treats *Re Harford's Trusts* as overruled, and the other Lords Justices concurred. Then there was the case of *Re Martyn* (26 Ch. Div. 745), a case in which one of three trustees of funds that were immediately divisible had become lunatic, and under the exceptional circumstances of the fund being immediately divisible the Court made an order giving the other two trustees the power to deal with the funds.

"Then comes the case of *Re Lamb's Trusts* (28 Ch. D. 77), Mr. Justice Pearson adopted as the settled practice of the Court that where there is a continuing trust, the Court will not appoint a smaller number of trustees. The only other case cited is that of *Davies* v. *Hodgson* (32 Ch. D. 225), and in that case I saw my way under exceptional circumstances to make an order for the appointment of the continuing trustees in the place of themselves and a bankrupt trustee. It seemed to me there were two grounds in that case on which it might be done; in the first place the funds were to be paid into Court, and I do not see any difference between paying funds into Court and dividing them for this purpose; and in the second place an action for administering the trusts was actually pending, and the Court had complete control of the matter."

Trustee not re-appointed.

Where a trustee has been validly appointed, the Court will not re-appoint existing trustees in order to obtain jurisdiction to make a vesting order under sect. 34.

In *Re Dewhirst's Trusts* (33 Ch. Div. 416), Cotton, L. J. (*Ib.* p. 418), sums up the facts:—

"There were three trustees of the will of a testator, one of them, although not a lunatic, was in such a state of mind and body that he was not able to attend to any business. Under a power in the will another person was appointed a trustee in his place, but as he is unable to assign the mortgages in which the trust funds are invested, in order to get rid of the difficulty a petition has been presented asking the Court to re-appoint the same person a trustee

under sect. 32 of the Act of 1850, in order that the Court may make a vesting order under sect. 34 of the same Act. . . Is it expedient to appoint a trustee in this case? There are already three trustees, and it is desired to re-appoint one of them, not because a new trustee is wanted, but in order to give the Court jurisdiction to make a vesting order under sect. 34. To do so would, in my opinion, be wrong; it would not be a proper exercise of the powers of the Act, because the circumstances contemplated by the Act do not exist. It does not appear to me to be the duty of the Court to make an order contrary to an Act of Parliament, in order to relieve the parties of a difficulty. It is for Parliament to amend an Act if amendment be required. . . It is said that there is authority in favour of the petitioners, and that such an order was made by the Court of Appeal in *Re Dalgleish's Settlement* (4 Ch. Div. 143). I have always steadily refused to follow that decision. There is no judge for whom I feel a greater respect than Lord Justice James, but whether he had the point brought to his attention and argued before him does not appear in the report. If there was any doubt whether the trustee in that case had been properly appointed, it might be right for the Court to re-appoint him. But if Lord Justice James did express an opinion that a trustee might be re-appointed in such circumstances as those now before the Court, I decline to follow that opinion. I have known cases in which this Court has declined to be bound by previous decisions of the Court of Appeal, even where pronounced by such eminent judges as Lord Justice Knight-Bruce and Lord Justice Turner. I doubt whether Lord Justice James did decide this point, but, if he did, we must overrule his decision, so that the case may no longer be treated as an authority."

Who may be appointed Trustees.

"The following rules and principles may, I think, safely be laid down as applying to all cases of appointments by the Court of new trustees.

Court regards wishes of author of trust.

"First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this descrip-

tion any distinction can be drawn between express declarations and demonstrated intentions. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.

Interest of all *cestuis que trust* regarded.

"Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator, or to the interests of others of the *cestuis que trusts*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is in duty bound to look to the interests of all, and not of any particular member or class of members of his *cestuis que trusts*.

Question if appointment will promote purpose of trust regarded.

"A third rule which, I think, may safely be laid down is—that the Court in appointing a trustee will have regard to the question whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution." (*Re Tempest*, L. R. 1 Ch. 485, p. 487, per Turner, L. J.)

Relations of *cestui que trustent*.

In *Wilding* v. *Bolder* (21 Beav. 222) a petition asked for the appointment of new trustees, one of whom was related to the *cestui que trustent*. Lord Romilly, M. R., said: "I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office. I have always observed that the worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestui que trustent* when they are nearly related to them."

Cestui que trust.

The Court will not, as a general rule, appoint one of the beneficiaries a trustee, but may do so under special circumstances.

Thus in *Re Conybeare* (1 W. R. 458), where an application was made for the appointment of one of the *cestui que trustent* as trustee in the place of a lunatic, and the appointment was desired by all parties, and there were special circumstances, Lord Justice Turner said: "Under ordinary circumstances, no doubt the Court will not appoint a trustee who is also one of the *cestui que trustent*, but this rule is not imperative, and where there are special circumstances, the Court will exercise its discretion in judging whether the case is one in which the rule may be departed from. Here, I think, under the special circumstances, we may make the appointment asked."

And cf. *Re Dixon* (21 W. R. 220); *Re Price* (W. N. 1883, p. 202), *ante*, p. 32; *Re Currie* (10 Ch. Div. 93); and *Re Howarth* (16 Ch. D. 672), *ante*, p. 36; and *Tempest* v. *Camoys* (58 L. T. N. S. 221).

Tenant for life appointed where onerous duties.

And in *Ex parte Clutton* (17 Jur. 988), where an application was made for the appointment of a tenant for life to act with other trustees, Vice-Chancellor Wood said: "I have a great objection, of course, to appoint one of the *cestui que trustent* to be a manager of this property. But in this case the trusts are so onerous, that it would, perhaps, be difficult to find any stranger who would undertake them, and, indeed, that appears by the affidavit. You may take the order."

Husband of *cestui que trust.*

In *Re Hattat* (W. N. 1870, p. 14), on a petition for the appointment of two trustees of a will, one of the proposed trustees being the husband of one of the *cestui que trustent*, the Master of the Rolls made the order asked upon an undertaking by the husband that if he became sole trustee he would immediately take all proper and necessary steps for the appointment of some person to be a co-trustee.

Women.

In *Re Campbell* (31 Beav. 176) there was a petition to appoint two new trustees, one of the proposed persons being a *feme sole*, but in other respects unexceptionable. The Master of the Rolls (Romilly) doubted whether the Court ever appointed a *feme sole* to be a trustee, but said he would consult the other judges. Having done so, and the affidavit being satisfactory, he made the order.

And in *Re Berkely* (L. R. 9 Ch. 720) the Court appointed an unmarried lady, aged twenty-seven, who was a relative of the *cestui que trustent* under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office.

Solicitor.

In *Re Brenthall* (W. N. 1872, p. 77), one of three proposed new trustees was a member of the firm of the petitioner's solicitors. The Master of the Rolls saw no objection to the appointment, and made the order as prayed.

But in *Re Orde* (24 Ch. Div. 271) Lord Justice Baggallay said it would not be regular to appoint a member of the firm acting for the petitioners a trustee, and some one must be named in his place.

Agent.

Upon a petition by all the *cestuis que trust* for the appointment of two Canadians and the English agent as new trustees, and for authority to pay the English trustee a commission on rents received by him, Mr. Justice Stirling sanctioned the payment of a commission to the English trustee upon being satisfied as to the necessity and propriety of the proposed remuneration. (*Re Freeman*, 37 Ch. D. 148.)

Out of jurisdiction.

Where all the *cestui que trustent* are resident out of the jurisdiction, the Court may appoint new trustees who are resident out of the jurisdiction. (*Re Liddiard*, 14 Ch. D. 310; citing *Re Wayre*, 18 May, 1877; *Re Cunard*, 27 W. R. 52.)

In *Re Long* (17 W. R. 218) Vice-Chancellor Malins stated that he was not aware of any case where the Court had authorized the appointment of foreign trustees, and that trustees in New Zealand must be considered foreign.

In *Re Freeman* (37 Ch. D. 148) the *cestuis que trust*, some of whom were infants under a settlement of freehold farms in Wales, were all resident either in Canada or the United States. And the Court appointed two persons resident in Canada and the English agent new trustees, but required an undertaking by the trustees out of the jurisdiction, in case the power of appointing new trustees should become exerciseable by either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the Court. Mr. Justice Stirling said (*Ib.* p. 151), "It is only in very exceptional circumstances that persons resident out of the jurisdiction ought to be appointed trustees; and I am under the impression that I have already declined to appoint such persons to be trustees in a case which resembled *Re Liddiard*. But in this case the subject-matter of the settlement is real estate, and if there was no power of sale so that the property could not be removed out of the jurisdiction of the Court, I think that, under the circumstances, I should appoint the two persons resident in Canada."

The new trustees to have the powers of trustees appointed by decree in suit.

33. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Delegation.

Formerly, although the Court could appoint new trustees, except in the case of charities (*Re* 52 Geo. 3, c. 101; 12 Sim. 162), it could not delegate a power of appointment, even where the settlement gave such a power, to the trustees and their successors. (*Holder* v. *Darbin*, 11 Beav. 594; Sug. Real Property Statutes, 2nd ed. p. 443.)

In *Oglander* v. *Oglander* (2 De G. & Sm. 381) it was held by Vice-Chancellor Knight-Bruce that trustees appointed by the Court would not have the power of appointing new trustees in their own place.

And in *Newman* v. *Warner* (1 Sim. N. S. 457) it was held that a power of sale in a settlement given to A. and B., trustees to preserve contingent remainders, and the survivor of them, and the executors and administrators of the survivor, could not be exercised by trustees appointed by the Court in the place of A. and B.

But this was altered by Lord Cranworth's Act (23 & 24 Vict. c. 145); and now by sect. 33 of the Conveyancing Act, 1881, every trustee appointed by the Court has all the same powers and authorities as if he had been originally appointed by the instrument creating the trust. (Cf. *Cecil* v. *Langdon*, 28 Ch. Div. 1.)

C. A. 1881, sect. 33.

34. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

Power to Court to vest lands in new trustees.

Trustees not reappointed to give jurisdiction.

The Court will not, where a trustee has been validly appointed, reappoint him in order to obtain jurisdiction to make a vesting order under this section. (*Re Dewhirst*, 33 Ch. Div. 416, *ante*, p. 62.)

Re Dalgleish's Settlement (4 Ch. Div. 143), and other cases deciding the contrary (*Re Morris*, 4 N. R. 480; *Re Mundel*, 8 W. R. 683; *Re Clay*, W. N. 1873, 129; *Re Chell*, 49 L. T. N. S. 196), are now overruled.

A vesting order may be made, although there is no incapacity in the person seised of the legal estate to convey to the new trustees.

In *Re Manning* (Kay, App. xxviii.) a petition was presented for the appointment of new trustees and a vesting order, the trustees having died and there being no power of appointing new trustees. There was nothing to prevent the property from being conveyed to persons appointed by the Court. Vice-Chancellor Wood said "that he had conferred with other judges, and found that vesting orders had only been refused when the facts of the particular case rendered it improper to make such an order. None of the learned judges had any hesitation as to the power of the Court to make such an order, though there might exist a person capable of executing a conveyance. In this case the order might be made."

In *Re Hughes* (2 H. & M. 695) there was a mortgage of nine-undivided shares in certain hereditaments to R., with a power of saleto R., his heirs, executors, administrators, and assigns. R.'s

daughter on her marriage covenanted to settle after-acquired property. R., by his will, devised his real and personal estate, including money on mortgage, to his wife for life, with remainder to his daughter absolutely. In a suit of *Hughes* v. *Young*, it was held that the covenant extended to the mortgage, and R.'s executors were ordered to transfer the mortgage to the trustees of the settlement, who now wished to exercise the power of sale, but were unable to convey the legal estate. On a petition being presented, Vice-Chancellor Wood said (*Ib.* p. 696): "I think that such a case as this is clearly within the provisions of the Act, and as it seems to me that the trustees of the settlement are under the circumstances new trustees of the mortgage, you may take an order vesting the land in them, subject to the equity of redemption."

This section extends to leaseholds.

Thus, in *Re Rathbone* (2 Ch. Div. 483), a testator, Rathbone, devised and bequeathed his residue to two executors on certain trusts. The surviving executor appointed three executors, one of whom declined to act, and the other two proved the will, but did not act with regard to Rathbone's estate, and died.

Upon a petition, Vice-Chancellor Hall appointed new trustees, and made a vesting order as to the *choses in action*, but not as to the leaseholds. The Court of Appeal, however, made a vesting order of the leaseholds.

Power to Court to vest right to sue at law in new trustes.

35. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

Orders in Chambers.

On a petition for the appointment of new trustees and a vesting order, the judge has power, under the Masters Abolition Act, 1852 (15 & 16 Vict. c. 80), to dispose in Chambers of such part of the matters brought before him on the petition as can be more conveniently disposed of in Chambers. (*Re Tweedy*, 28 Ch. Div. 529.) In that case Lord Justice Fry observes (*Ib.* p. 541):—

"The broad proposition of the Bank of England is, that no vest-

ing order can be made upon a summons in Chambers. That question turns upon the statutes and the general orders of the Court. The first statute to be considered is the Trustee Act, 1850. The 35th section of that Act provides" (reads section). "Therefore it is plain that the Legislature contemplates the possibility of two orders being made in the matter. Then the 40th section enables the person beneficially entitled to apply by petition." And, after referring to the 43rd section, he observes: "It appears to me quite plain that under the Trustee Act, 1850, it would be competent for the Court, on an appointment of new trustees, to permit the question of the vesting order to be brought before it on a motion in the matter which originated in the petition. . . . It appears to me the effect of that section (15 & 16 Vict. c. 80, s. 11) was to introduce a totally new practice in the Court of Chancery, and enable the Court to dispose in Chambers, if it thought fit, of matters which, before that time, must have been disposed of in some other manner.

Trustees will not be reappointed in order to make vesting order.

Where a new trustee has been appointed under a power in place of one who has become incapable, there is no jurisdiction under these Acts to re-appoint the new trustee and vest the trust estate in the continuing trustees and such new trustee. (*Re Dewhirst*, 33 Ch. Div. 416; *ante*, p. 62.)

Nor will existing trustees be appointed new trustees in the place of themselves and a bankrupt trustee who has absconded. (*Re Gardiner's Trusts*, 33 Ch. Div. 590.)

"Call for a transfer."

In *Re Smyth* (2 De G. & Sm. 781) an order was made vesting the right in certain stock in trustees appointed by the Court. The bank refused to transfer to them. On the matter being brought before the Court again, the Vice-Chancellor said (4 De G. & Sm. 499): "I must attribute some meaning to the words 'call for a transfer.' The argument on behalf of the petitioners would strike one section out of the Act as surplusage. The construction contended for may not be without foundation." He accordingly declared the new trustees entitled to "call for a transfer" of the stock.

The doubt felt in this case was removed by sect. 6 of the Trustee Extension Act, 1852, *post*, p. 112.

The Court has power under this section, in connection with sects. 5 and 32, to make an order, both in Lunacy and in the Chancery Division, appointing and vesting the right to transfer stock in three new trustees in the place of three old ones, of whom one is dead, one bankrupt, and one lunatic. (*Re Duce*, 30 W. R. 759.)

Old trustees not to be dis-

36. And be it enacted, that any such appointment by

charged from liability.

the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

Cestui que trust.

On a petition being presented for the appointment of new trustees in the place of two who were desirous of retiring, the Master of the Rolls required that both the old trustees and *all* the *cestui que trustent* should appear, and directed the petition to stand over for that purpose. (*Re Sloper*, 18 Beav. 596; cf. *Re Fellows*, 2 Jur. N. S. 62; and cases cited *post*, p. 73.)

Contingent interest.

A person who has a contingent interest in a trust fund has a *locus standi* to present a petition for the appointment of new trustees. (*Re Sheppard*, 4 De G. F. & J. 423.)

Where a chapel was conveyed to trustees upon trust, among other things, "to allow such person to preach as the Wesleyan Conference should appoint," it was held the conference might join in a petition for the appointment of new trustees. (*Re Harden Wesleyan Chapel*, 1 W. R. 212.)

Creditor.

In *Re Wragg* (1 De G. J. & S. 356) it was held that *creditors* who had obtained a decree for the administration of the estate of a deceased debtor, under which a contract for sale had been entered

into, and the purchase-money paid into Court, were beneficially entitled under this section.

Committee.

In *Re Wheeler* (1 De G. M. & G. 434) the *committee* of a lunatic mortgagee joined with the mortgagor in a petition for a vesting order in the mortgagor on the payment of the mortgage-money due into Court. Lord St. Leonards, L. C. (*Ib.* p. 436), said: "I think that the proceedings in such cases as this should originate with the committee, and not with the mortgagor; and in future, therefore, unless the committee declines to present a petition, I shall not give the mortgagor his costs."

Where stock was invested in the names of G. and H., in trust for a lunatic, and G. died in 1864, leaving E. his executor (H. having died before, but no proof of his death upon which the bank could act had been forthcoming), an order was made appointing a person to concur with E. in transferring the fund into Court; but it was held that such an order could not have been made upon the petition of the committee alone. (*Ib.*)

Married women.

Married women can, since the Married Women's Property Act, 1882, petition without their husbands.

Thus, in *Re Outwin* (31 W. R. 374), where a petition for the appointment of new trustees of property to which two married women were entitled (subject to a life interest and certain executory interests) was presented, making the husbands petitioners, liberty to amend by striking out the names of the husbands as petitioners, on the ground that the married women were "suing" within the meaning of sect. 1, sub-sect. (2), of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), was given.

Power to go before the master in the first instance.

38. *And be it enacted, that when any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor, intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit before any one of the Masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said Master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate.*

Power to petition the Court or the Lord Chancellor.

39. *And be it enacted, that any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the Master.*

By the Masters in Chancery Abolition Act, 1852 (15 & 16 Vict. c. 80), the office of master was abolished, and since that date these sections became obsolete, and they were repealed by the Statute Law Revision Act, 1875.

Power to present petition in the first instance.

40. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

Service.

Service out of the jurisdiction.

It would seem doubtful whether a petition can be served out of the jurisdiction.

In *Skinner* v. *Hodge* (W. N. 1866, p. 301) an application to serve a defendant resident in Jersey was granted; and in *Re Morant* (W. N. 1879, p. 144) a petition under the Trustee Relief Act was allowed to be served on two respondents resident in Scotland.

In *Re Haney* (L. R. 10 Ch. 275) the Lords Justices James and Mellish stated their opinion to be that service of a petition under the Trustee Relief Act out of the jurisdiction could be directed.

In *Re Wycherley* (1 L. R. Ir. 12) service of a petition for the appointment of new trustees was allowed on minors resident at Pau, in France.

In *Re Busfield* (32 Ch. Div. 173, p. 129) Lord Justice Cotton said service of a petition under the Trustee Relief Act was only giving

a party notice that if he does not come in the Court will deal with the fund in his absence.

In *Colls* v. *Robins* (54 L. T. N. S. 479), where some of the persons entitled to certain funds in Court were resident out of the jurisdiction, and it was impossible to deal with such funds unless a petition, which had been presented asking for payment out of a portion thereof, was served upon such persons, Mr. Justice Kay gave liberty to serve the petition, together with a copy of the order, upon them.

In *Re Gordon* (W. N. 1887, p. 192) service of a petition under the Trustee Relief Act out of the jurisdiction was allowed.

But in *Re Jellard* (39 Ch. Div. 424) Mr. Justice North said, "I do not see that I have power under rule 1 of Order XI. to allow service out of the jurisdiction of anything but a writ of summons, or notice of a writ of summons," and declined to follow *Re Gordon*.

Cestui que trust.

All the *cestui que trustent* should be petitioners, or be served, if possible.

In *Re Fellows* (2 Jur. N. S. 62) a petition was presented for the appointment of new trustees of a settlement, and payment out of Court of the settled funds asked for. The infant *cestui que trustent* were not represented, the petition being presented only by those who were *sui juris*. Vice-Chancellor Wood directed the petition to be amended by making the infant *cestui que trustent* parties by their next friends.

And where seven grandchildren formed a class entitled to a trust fund, and six out of the seven desired the appointment of a new trustee, and obtained a master's certificate under sect. 38, Vice-Chancellor Parker said, "These applicants did not sufficiently represent the class of persons for whom the fund was held. *Primâ facie* the application should be by all parties interested in the fund. Circumstances might render an application by all the persons impossible; but no such impossibility had been suggested in the present case, and the fund was not sufficiently represented." (*Re Richards*, 5 De G. & Sm. 636.)

In *Re Maynard* (1 W. R. 15; 16 Jur. 1084), a petition was presented by the tenant for life for the appointment of a new trustee in the place of one resident in New York. No one was served. Vice-Chancellor Stuart said the remaindermen must be served.

Service dispensed with.

Although it has been usual, "and certainly the practice in lunacy, upon applications by persons having partial interests, to require the other parties interested to be served, the Act does not in terms so require, and it has not been unusual to dispense with

service on all parties." (*Re Blanchard*, 3 De G. F. & J. 131, p. 137, per Turner, L. J.)

In *Re Lightbody* (W. N. 1885, p. 3) a petition was presented for the appointment of new trustees by all the *cestui que trustent* except one who was resident in Buenos Ayres, and *sui juris*. It was asked that service of the petition upon him might be dispensed with. Mr. Justice Kay said that, although he had no express power under the Act to dispense with service on the *cestui que trustent*, yet he thought the passage in the judgment in *Re Blanchard*, which had been referred to, was an authority in that behalf, and he would accordingly dispense with service.

Trustee of unsound mind.

When a petition is presented for the appointment of a new trustee in the place of a trustee of unsound mind, service upon the trustee of unsound mind is unnecessary. (*Re Green*, L. R. 10 Ch. 272.)

And where a new trustee had been appointed under a power in the place of a person of unsound mind not so found by inquisition, it was held that it was not necessary to serve the trustee of unsound mind with a petition for a vesting order. (*Re East*, L. R. 8 Ch. 735.)

Where the next of kin of a lunatic are unknown, a petition in lunacy should be served on the Attorney-General, and not on the solicitor to the Treasury. (*Re Bourke*, 2 De G. J. & S. 426.)

Absconding trustee.

And where a trustee has absconded, an order appointing a new trustee may be made in his absence, and it is not necessary that he should be served with the petition. (*Hyde* v. *Benbow*, W. N. 1884, p. 117, Kay, J.)

Resident abroad.

And where a trustee is permanently resident abroad, the Court has jurisdiction to appoint a new trustee in his place without his consent, and without his being served with the petition. (*Re Bignold*, L. R. 7 Ch. 223, and cases cited *ante*, p. 58.)

Refusing.

A trustee who has refused or neglected to convey land or transfer stock, &c., after a request in writing, need not be served with a petition for a vesting order. (*Re Baxter*, 2 Sm. & G. App. 5; cf. *Ex parte Armstrong*, 16 Sim. 296, *ante*, p. 39.)

Mortgagor need not be served with petition of committee of a lunatic mortgagee.

When the committee of a lunatic mortgagee presents a petition for the re-conveyance of the mortgaged estates to the mortgagor, the mortgagor ought not to be served.

In the case of *Re Rowley* (1 De G. J. & S. 417) the Lords Justices directed the mortgagor's costs of a similar petition to be paid by the committee, and allowed them out of the estate, but intimated their opinion that in future mortgagors ought not to be served with such petitions. "I wish it to be understood as a settled rule that, for

the future, in cases of this kind, a mortgagor, whether served or not, will not have his costs out of the lunatic's estate. I think that under no circumstances a mortgagee ought to pay the mortgagor's costs." (*Re Phillips*, L. R. 4 Ch. 629, per James, L. J.)

The committee of a lunatic trustee should be served.

Committee of lunatic trustee.

In *Re Saumarez* (8 De G. M. & G. 390), on a petition for a vesting order of property of which a lunatic trustee was possessed, Lord Justice Turner suggested that as the trustee might have acted he might have some claims, and the L.JJ. held that the committee ought to be served.

In *Re Parker* (32 Beav. 580) Lord Romilly, M. R., said he could not appoint a new trustee in the place of a lunatic in the absence of the committee.

In *Re Wood* (7 Jur. N. S. 313), where a widow, the sole surviving executrix, married again, and her husband became a lunatic, the costs of his committee, who appeared, were allowed out of corpus.

Annuitant need not be served.

An annuitant need not be served. Thus, in *Re Winteringham* (3 W. R. 518), where C. D. devised real estate to trustees on trust, after payment of debts and legacies, and subject to annuities charged thereon, to convey to A. B. in fee, it was held, upon the petition of the devisee for a conveyance by C. D.'s trustee, debts and legacies having been paid, that the concurrence of the annuitants in the petition was unnecessary. Vice-Chancellor Wood said "he considered there was no doubt upon the point, and that the consent of the annuitants to the conveyance requested was unnecessary. He should direct the trustee to convey accordingly."

Lessor.

A lessor need not be served with a petition for a vesting order of leaseholds, unless there is a restraint upon alienation. Thus, in *Re Matthew* (2 W. R. 85) the surviving trustee of a term died intestate, and no administration was taken out; an order was made (following *Re Hazeldine*, 16 Jur. 853) appointing a new trustee and vesting the estate in him, without the petition being served upon the owner of the fee. Vice-Chancellor Wood said "he thought the vesting order must operate in the same manner as if an assignment had taken place to the new trustee, and consequently the landlord could not be said to be without a tenant. The Court would be doing no more than if the actual tenant had assigned; and, in the absence of any clause against assignment in the lease, the landlord could not have prevented an alienation, and need not now be served."

Trust term.

But in *Re Farrant* (23 L. J. Ch. 532), where land was demised to trustees for a long term to raise a sum of money to be held upon certain trusts, on the presentation of a petition for the appointment of new trustees, Vice-Chancellor Knight-Bruce said that he should

decline to make the order, unless with the consent of, or service of the petition upon, the reversioner.

Heir of testator.

Where the trustees named in a testator's will have predeceased him, his heir should be served with a petition for the appointment of new trustees. (*Re Smirthwaite*, L. R. 11 Eq. 251; cf. *Gunson* v. *Simpson*, L. R. 5 Eq. 332.)

Infant heir.

It would seem to be the safer course to serve the infant heir of a deceased trustee or mortgagee to whom lands have descended.

Service dispensed with.

In *Re Willan* (9 W. R. 689) it was held that a petition for the appointment of a person to convey in the place of the infant heir of a deceased mortgagee need not be served upon the infant.

And where an infant heir had been served, but no guardian *ad litem* appointed, and he did not appear, the note of intended service was struck out and a vesting order made. (*Re Tweedy*, 9 W. R. 398.)

And in *Re Wise* (5 De G. & Sm. 615), where a debtor surrendered copyholds to the use of a creditor, his heirs and assigns, upon trust to sell, and out of the proceeds pay himself 200*l.* and interest, and the creditor died in 1851, and in 1851 his personal representative contracted to sell, and the customary heir was an infant, and the debtor died intestate and without any legal personal representative, the Court made an order vesting the copyholds in the purchaser without service of the petition upon the customary heir or the personal representative of the debtor.

In *Re Little* (L. R. 7 Eq. 323) the sole trustee of a settlement died intestate, and new trustees were appointed under a power, and Vice-Chancellor James made a vesting order in the new trustees without service on the infant heir of the sole trustee.

Service required.

But in *Re Jones* (22 W. R. 837), on a petition for an order vesting the legal estate outstanding in the infant heir-at-law of a deceased mortgagee, although *Re Willan* (9 W. R. 689) was cited to prove that service on the infant was unnecessary, as was *Re Gibson* (26th June, 1874), in which case Vice-Chancellor Hall made a similar order without service on the heir, the Master of the Rolls (Jessel) considered that it was contrary to principle to take an estate out of a person without giving him notice, and directed the petition to stand over for the purpose of being served on the infant.

And in *Re Adams* (35 W. R. 770), on a petition that lands, the legal estate in which had descended to the infant heir of the last surviving trustee, might be vested in the beneficiaries, Shelford's Real Property Statutes (8th ed. p. 653) were cited to show that service on the infant was unnecessary; but Mr. Justice Kay said: "I decline to follow the practice as there stated. The petition

must be served on the infant heir, and stand over until it has been so served."

Adult heir should be served.

In *Purvis* v. *Abraham* (W. N. 1866, p. 126) a petition was presented in a cause for the appointment of new trustees. The Vice-Chancellor asked if the heir had been served, and *Re Tweedy* (9 W. R. 398) was cited as showing that it was not the practice to serve the heir, and although the heir was adult the order was made without requiring service upon him.

But in *Re Oxenham* (W. N. 1875, p. 6, V.-C. H.), on a petition for the appointment of new trustees and a vesting order, where the legal estate in the freehold part of the property had descended upon the heir-at-law of the last surviving trustee, who was an adult, the heir-at-law was directed to be served with the petition, as he was an adult and might be entitled to costs; and the order was made subject to the production of his consent.

Form of Petition.

Title.

A petition intituled in a cause, for the appointment of new trustees, should be intituled also "In the matter of the Trustee Acts." (*Huntley* v. *Clutterbuck*, W. N. 1872, p. 81.)

In *Gough* v. *Bage* (25 L. T. N. S. 738) a purchaser presented a petition for a vesting order of real estate, the sale of which had been directed in a creditor's administration suit, and the vendor in whom the legal estate was vested being out of the jurisdiction, Vice-Chancellor Bacon ordered the petition to be amended by intituling it in the matter of the Trustee Act, 1850, and, upon that being done, made the order as prayed.

Names of respondents.

The names of the parties to be served should be placed at the foot of the petition. (Ord. LII. r. 16.)

The names must be given in full; to describe them simply as "the plaintiffs and defendants" is not sufficient. (*Meyrick* v. *Laws*, W. N. 1877, p. 223; *Anon.*, W. N. 1876, p. 219.)

Sections to be referred to.

The last paragraph should state the particular sections of the Acts under which it is proposed that the order should be made. (*Anon.*, Court of Appeal, 84 L. T. 23; *Re Moss*, 37 Ch. D. 513; *Re Hall*, W. N. 1888, p. 16; 58 L. T. N. S. 76.)

Trustees may now be appointed by summons in chambers. (Ord. LV. r. 13A, *post*, p. 83.)

Evidence.

Affidavits which had been filed in a cause were, in *Re Pickance* (10 Hare, Appendix xxxv.), allowed to be used as evidence of facts in a petition under the Trustee Act. The affidavits proved the pedigree of the parties.

In *Re Hoskins* (4 De G. & J. 436), on a petition for the appoint-

ment of new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of baptismal and other certificates.

Affidavit of fitness.

But an affidavit of the solicitor of the parties as to the fitness of the proposed trustees will not be sufficient.

Thus, in *Grundy* v. *Buckeridge* (17 Jur. 731), on an application to have two persons appointed new trustees, the evidence as to fitness consisted of an affidavit by the solicitor in the cause. Vice-Chancellor Wood "refused to act upon such evidence, which he had already refused as unsatisfactory in two previous applications on that day. The affidavit ought to be by some person well acquainted with the parties, but not engaged as solicitor in the cause. One of the duties of the trustees is to watch the conduct of the solicitor."

The Court must be satisfied of the fitness of the proposed trustees, and of their willingness to act. (*Re Tunstall*, 4 De G. & Sm. 421; Daniel, 2122.)

Position of proposed trustees should be shown.

In *Re Castle Sterry's Trusts* (W. N. 1888, p. 179), on a petition for the appointment of new trustees of real estate of small value, the affidavit of fitness of the proposed trustees stated that they were persons of integrity and fit to be appointed trustees, one of them being described as a farmer and the other as a carpenter, but it did not appear what their financial means were. Mr. Justice Kay said that "these affidavits were in what now seemed to have become a common form, to which he greatly objected. In his opinion, affidavits filed in order to induce the Court to appoint new trustees should show something as to the position of the proposed trustees in respect of their pecuniary means." In that case, having regard to the nature of the property, he accepted the affidavits as sufficient, but in the case of a subsequent application on the same day, his Lordship declined to accept affidavits of fitness similarly worded.

Gentleman insufficient description.

It is not sufficient to describe the person making an affidavit of the fitness of a proposed trustee merely as a "gentleman." "The Court cannot accept affidavits of fitness by persons who are merely described as 'gentlemen,' without stating their occupation. In future, if the other members of the Court concur, I shall not receive any such affidavit, nor allow the costs of it." (*Re Orde*, 24 Ch. Div. 271, per Cotton, L. J., and Bowen, L. J., concurred.)

One affidavit sufficient.

"Upon the appointment of a new trustee an affidavit of fitness by a deponent whose evidence can be relied upon is sufficient, and for the future we must disallow the costs of a second affidavit of fitness." (*Re Arden*, W. N. 1887, p. 166, per Lord Justice Cotton.)

Consent of

A petition for the appointment of new trustees should be sup-

ported in Lunacy by a written consent of the proposed trustees to serve, with an affidavit verifying their signature. The consent of a new trustee to act is in Chancery sufficiently evidenced by a written consent signed by him, and verified by the signature of his solicitor. (Ord. XXXVIII. r. 19A.) proposed trustees to act.

In *Re Battersby* (16 Jur. 900), on a petition for the appointment of new trustees, it was asked that the trustees named in the petition might be appointed without a reference to the master upon an affidavit of fitness and the written consent of the parties to accept office. Romilly, M. R., said that was sufficient, and he wished it to be known that in all cases of this kind he required the written consent of the parties proposed to be appointed trustees.

In *Re Parke* (21 L. T. O. S. 218) an order had been made for the appointment of new trustees, but no affidavit by them of their consent to act had been produced to the registrar, who accordingly declined to draw up the order. There was an affidavit of a third party that the trustees were willing to act. The property was small, and it was asked that the usual verification might be dispensed with.

Vice-Chancellor Stuart said, "It is not sufficient to show the trustees' consent by the affidavit of a third party. They might, if they had chosen, instruct the counsel for the petitioner to appear and consent for them."

The proposed trustees need not appear to consent to act. (*Re Draper*, 2 W. R. 440.)

Where a trustee is appointed in Chancery as well as in Lunacy his signature to his consent to act may be verified in manner provided by Ord. XXXVIII. r. 19A, and need not be verified by affidavit according to the old practice. *Re Wilson* (31 Ch. Div. 522) seems to have been decided under the impression that the petition was in Lunacy only. (*Re Hume*, 35 Ch. Div. 457.)

In *Re Badcock* (2 W. R. 386) A., without devising lands to his executors, L. and G., directed them to sell the lands, and contracted to sell them after the date of his will to X., who objected to the executors' title and required A.'s heir to join. The Court refused to vest the legal estate in one executor alone, unless his co-executor had finally renounced, but made an order vesting the estate which was in A.'s heir in both executors. Disclaimer.

In *Re Ellison* (2 Jur. N. S. 62) a petition was presented for the appointment of a new trustee of trust estate, originally vested in two trustees, both of whom were dead, the survivor having devised trust estates to a devisee who refused the trust, but had not executed a formal deed of disclaimer. Vice-Chancellor Wood said: "There must be another trustee; the Court will not appoint one trustee

only where there were originally more than one. The devisees in trust ought also to execute a deed of disclaimer. I am by no means sure that a parol disclaimer will divest the estate out of them. As to the personalty, there is, of course, no difficulty, as that would vest in them merely by the will. The disclaimer may therefore be confined to the freeholds. But a disclaimer in Court on a petition is not like a disclaimer on a bill, as the latter is entered of record, but the former is not, and is, I think, no more than a parol disclaimer."

But in *Foster* v. *Dawber* (1 Dr. & Sm. 172), upon a petition for the appointment of new trustees by the Court, Vice-Chancellor Kindersley held that it was not necessary that a trustee who had never acted should disclaim by deed, but that a disclaimer by his counsel at bar was sufficient.

In *Re Proctor* (16 Jur. 233), where the appointment of new trustees without a reference to the master was asked, the property being under 200*l.*, the evidence being defective, Lord St. Leonards, L. C., said: "You ask me to make the order without a reference to the master. This I would willingly do to save expense, but the evidence is insufficient. I may be giving one man's property to another. All I can do in such cases is to examine the proofs instead of the master. I shall expect in such cases *strict proof*. You may amend your petition, but I shall make an order that the costs of this day's attendance shall not be allowed."

What may be done upon petition.

41. And be it enacted, that upon the hearing of any such *motion or* petition it shall be lawful for the said Court or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or for the said Lord Chancellor to direct such *motion or* petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court or before the said Lord Chancellor, or to enable notice or any further notice of such *motion or* petition to be served upon any person or persons.

The words "motion or," wherever they occur, are repealed by the Statute Law Revision Act, 1875.

Petition may be dismissed

42. And be it enacted, that upon the hearing of any

such *motion or* petition, whether any *certificate or* report from a master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such *motion or* petition, with or without costs, or to make an order thereupon in conformity with the provisions of this Act. with or without costs.

The words "motion or" and "certificate or" are repealed by the Statute Law Revision Act, 1875.

43. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act. Power to make an order in a cause.

An order under this section may be made in a cause without petition. (*Wood* v. *Beetlestone*, 1 K. & J. 213, *ante*, p. 45.) Order without a petition.

Where property is vested in a lunatic, it was formerly held there must be a petition in lunacy. (*Jeffryes* v. *Drysdale*, 9 W. R. 428. But see *Herring* v. *Clark*, L. R. 4 Ch. 167, *post*, p. 104.)

In *Re Holbrook* (8 W. R. 3; 5 Jur. N. S. 1333, *post*, p. 110), a further order was made upon motion in the matter after an order had been made upon petition.

But an order cannot be made without a petition unless a judgment or order has been made for the sale, conveyance, or transfer of any stock or hereditaments (see *post*, p. 103), or an action is actually pending.

In *Re Gill*, *Smith* v. *Gill* (34 W. R. 134), the facts are summed up in Mr. Justice Kay's judgment:— Trustees not appointed upon originating summons.

"An application was made in chambers, not in any action to appoint trustees. The proceedings were commenced by an originating summons in chambers. Now, clearly, different considerations would have arisen if there had been a pending action, and the application had been made in that pending action. But that is not so. The Trustee Act, 1850, prescribes two modes of procedure—one by petition, if the application is not made in an action; the other by motion or summons, if it is in an action. Instead of a petition in this case, an originating summons was taken out in chambers, which, as afterwards amended, asked for the appointment of new

trustees. It appeared to me that the case was not within the provisions of the Trustee Acts, but counsel referred to certain other Acts of Parliament as extending, or which possibly might extend, the jurisdiction, and which might give power to appoint trustees in Chambers upon an originating summons where no action was pending. I took some little pains to investigate the Acts of Parliament, and found they were these" (reads 18 & 19 Vict. c. 134, s. 16, and 47 & 48 Vict. c. 61, s. 13). "It seems to me, laying these two sections side by side, the object of the latter enactment is merely this—with respect to making general orders which allow procedure by summons in chambers, instead of by petition, to give the same powers to the Lord Chancellor, with the assistance of the judges, in respect of the Acts of Parliament passed after the Act of 1855, as that Act gives to them in respect of Acts passed before; but still you must have the general order. . . . No such general order has been made, and therefore the Court has not jurisdiction on originating summons, not in an action, to make an order appointing trustees. I believe the only exception is under the Rules of Court, 1883, Ord. LV. r. 2 (8), in cases where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock, or of any hereditaments, corporeal or incorporeal, in which cases the practice is to make the order on summons without any petition to the Court."

But in *Re Allen, Simes* v. *Simes* (56 L. J. Ch. 779), upon an originating summons asking for general administration and the appointment of new trustees, all the parties interested being parties to the application, and *Re Fawcitt* (30 Ch. D. 231) having been cited to show that a cause was in fact pending, and the case was distinguishable from *Re Gill*, Mr. Justice Stirling said he thought the plaintiff's contention was right, and the Court had power to make the order in the exercise of its general jurisdiction.

But now, by Ord. LV. r. 13A, "In all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and new trustees thereupon appointed. The summons shall be intituled in the same manner as the petition ought to have been, and shall be served upon the same persons upon whom the petition ought to have served."

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

44. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a

mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any Court of Law or Equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or reassignment of any lands conveyed or assigned by any order under this Act, or a redisposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Under the provisions of this section the value of an order under the Act is limited to its being conclusive evidence of the matters alleged only upon any question as to the legal validity of the order. (*Collinson* v. *Collinson*, 3 De G. M. & G. 404, p. 409, *post*, sect. 53.)

"These provisions as to evidence do not seem to apply to orders by the Palatinate Court." (Dart, 6th edit. vol. ii. 657, n. (*c*).)

Trustees of charities.

45. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any

power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorising the said Court to make an order to that effect in a summary way upon petition.

Charitable Trusts Act.

By the Charitable Trusts Act (16 & 17 Vict. c. 137) new trustees of any charity, the gross annual value whereof exceeds 30*l.*, may be appointed by one of the equity judges in chambers, and the Court has power at the same time to make a vesting order under the Trustee Act; the sanction of the Charity Commissioners under sect. 17 must, however, be first obtained.

(By sect. 32, where the income is below 30*l.*, the same jurisdiction was given to the District Courts of Bankruptcy and the County Courts.)

In *Re Davenport* (4 De G. M. & G. 839) new trustees of a charity were appointed under 16 & 17 Vict. c. 137, by the Vice-Chancellor, and the surviving trustee being lunatic, it was held to be competent for the Vice-Chancellor to make a vesting order under the Trustee Acts in chambers. "The meaning of the 28th section of the Charitable Trusts Act is to confer on the Master of the Rolls and the Vice-Chancellor sitting at chambers, the same jurisdiction as before the passing of the Act they could have exercised in a suit regularly instituted, or upon petition. The fact of the lunacy can make no difference, and I am of opinion, therefore, that the Vice-Chancellor may in this case make the order." (*Ib.*, per Lord Cranworth, L. C.)

In *Re Lincoln Chapel* (1 Jur. N. S. 1011), V.-C. Stuart insisted on a petition being presented for the appointment of new trustees, and a vesting order.

No escheat or forfeiture of property held upon trust or mortgage.

46. And be it enacted, that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

This section is taken from the Escheat and Forfeiture Act (4 & 5 Will. 4, c. 23), sect. 3.

Under sect. 8 of the Trustee Act, 1852 (*post*, p. 114), the Court has power to appoint new trustees in the place of persons convicted of felony. Felony.

By 33 & 34 Vict. c. 23, after the 4th of July, 1870, no confession, verdict, inquest, conviction or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat.

And cf. the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), extending escheat to the equitable interest. (See *Re Pratt*, 34 W. R. 757.)

In *Re Minchin* (2 W. R. 179), M., a mortgagee in fee, by her will, after directing payment of her debts, &c., devised all her real and personal estate to B. upon certain trusts. She was illegitimate, and left no issue. The Court made an order vesting the legal estate in the mortgaged premises in a purchaser, the mortgage being paid off.

47. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed. Act not to prevent escheat or forfeiture of beneficial interest.

This is taken from the Escheat and Forfeiture Act (4 & 5 Will. 4, c. 23), s. 5. But see now 33 & 34 Vict. c. 23 (*supra*, note to last section).

48. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the Accountant General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any Money of infants or persons of unsound mind to be paid into Court.

money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

The Paymaster-General is now substituted for the Accountant-General. (35 & 36 Vict. c. 44, s. 6.)

"The Act provides the simplest course of proceeding, and that is, that the mortgagor should bring the money into Court to the account of the person of unsound mind, and when that is done he is entitled to a vesting order, which he must obtain at his own cost." (*Re Sparks*, 6 Ch. Div. 361, p. 364, per James, L. J.)

Court may make a decree in the absence of a trustee.

49. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time

of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

In *Westhead* v. *Sale* (6 W. R. 52) an application was made under this section that a cause might be certified as ready for hearing, although one of two defendant trustees had not entered an appearance. *Sayer* v. *Bevan* (V.-C. S., 18 Dec. 1856) was cited, in which such an order had been made under similar circumstances, and *De Crespigny* v. *Ketson* (cited 12 Sim. 163) was also referred to; and Vice-Chancellor Wood made the order asked.

Power of master.

50. *And be it enacted, that when any person shall, under the provisions of this Act, apply to one of the masters of the Court of Chancery in the first instance, and adduce evidence, for the purpose of obtaining the certificate of such master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this Act shall be enforced by the same process as orders of the Court made in any suit against a party thereto.*

This section regulated the procedure under sects. 38 and 39. After 15 & 16 Vict. c. 80, the jurisdiction conferred on the masters by those sections was not exercised by the judges in Chambers. (Seton, 325.) This section, therefore, had become obsolete, and was repealed by the Statute Law Revision Act, 1875.

Costs may be paid out of the estate.

51. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Unnecessary petition.

An unnecessary petition is liable to be dismissed with costs.

In *Re Oakden* (26 Sol. Journal, 563) a petition was presented by the tenant for life of trust funds comprised in the will of a deceased testator for the appointment of a new trustee in substitution for one who was dead. Mr. Justice Chitty said that the proper course was to appoint a new trustee under sect. 31 of the Conveyancing Act, 1881, without coming to the Court. In the present instance he would make the order, with the view of sparing the parties expense, but similar petitions would in future be dismissed with costs. (Cf. *Re Gibbons*, W. N. 1882, p. 12, *ante*, p. 52.)

Two petitions.

Where two petitions were presented on the same day in the same matter, Vice-Chancellor Bacon considered the second petition more complete because two gentlemen to whom there was no objection were named as trustees, and notwithstanding the priority in date of the former petition, appointed the persons named in the second petition, and directed the costs of the second petition only to be paid out of the estate. (*Re Pring*, 42 L. J. Ch. 473.)

Where a plaintiff filed a bill for the appointment of new trustees in a case in which the appointment might have been made by petition under this Act, he was ordered to pay all the costs of the suit. (*Thomas* v. *Walker*, 18 Beav. 521.)

Trustee.

A trustee is entitled to costs, unless it is adjudicated against him that he has been guilty of misconduct, and until that is adjudicated his costs are not within the discretion of the Court. Whether he has been guilty of misconduct is a matter on which an appeal will lie. (*Re S. Knight*, 26 Ch. Div. p. 90, per Cotton, L. J.)

Thus, a bankrupt trustee who had been served with a petition, presented after a cause was in the paper, was allowed his costs of appearing therein as between solicitor and client, though no other costs were allowed. (*Turner* v. *Mullineux*, 9 W. R. 252.)

A trustee who disclaims at the bar will only be allowed costs as between party and party. (*Bulkeley* v. *Eglinton*, 1 Jur. N. S. 994.)

Respondents cannot be made to pay costs.

It is now settled that there is no jurisdiction to order respondents to pay costs.

In *Re Primrose* (23 Beav. 590) an order was made that the assignees in bankruptcy of a trustee should pay costs, but the order was altered on the ground that there was no jurisdiction to make it under the Trustee Act.

In *Re Sarah Knight* (26 Ch. Div. 82) a petition was rendered necessary by what Mr. Justice Pearson regarded as "shockingly vexatious" conduct on the part of the respondents, the executors of a deceased sole trustee; still he held that he could not order them to pay costs, although he could deprive them of costs. He said (*Ib.* p. 89): "There are two grounds upon which it is said that the respondents ought to pay costs. The first is this, that by sect. 31 of

the Conveyancing Act, 1881, they were authorized to appoint new trustees; that they were asked to do this and they refused. I do not think that on that ground I can order them to pay costs. I can conceive of many cases in which persons who are trustees, simply as being the representatives of a deceased trustee, may be very properly advised to do nothing to make themselves trustees. The second ground is that, on the transfer of the fund into their names, they became trustees of it, and as such bound to pay the dividends to W. (the tenant for life). I am of opinion that that was their real position, and that as they never asserted any right to the fund on behalf of the estate of B. (their testator), they were bound after the transfer to pay the dividends to the tenant for life, and if the petitioner had simply asked for the payment of the dividends to her, I should have made the respondent pay the costs of it. But it asks also for the appointment of new trustees of the fund, and as I am of opinion, as I have already said, that the respondents were not bound to exercise the power given to them by the Conveyancing Act, I cannot compel them to pay all the costs of a petition which was necessary for the appointment of new trustees. But I shall order them to pay so much of the costs as would have been incurred if the petition had asked simply for the payment of dividends, and I shall give them no costs."

On appeal, however, it was held, that the petitioners had not taken proper steps to satisfy the executors as to their title, and consequently there had been no such misconduct on their part as would justify the Court in depriving them of costs. They were allowed, therefore, their costs of the petition, but not of the appeal. The question whether there was jurisdiction to make respondents pay costs was accordingly left undecided.

It would seem, however, that the Judicature Acts and Rules of Supreme Court, 1883, Ord. LXV. r. 1, do not enable the Court or a judge to order costs to be paid by persons who, before the Acts came into operation, could not have been ordered to pay them.

In *Re Mill's Estate* (34 Ch. Div. 24) the question arose whether commissioners with power to take land could be ordered to pay the costs of applications for payment out of purchase-money, and there it was held, that up to the time of the passing of the Judicature Acts no order could have been made against the commissioners requiring them to pay the costs of the application for getting the money out of Court. On this point Lord Justice Cotton said (34 Ch. Div. 31):—

"Then we have to consider what is the effect of the Judicature Acts, and of the rules under those Acts. Now the rule which was relied upon is what was Ord. LV. r. 1, of the earlier orders, now

Ord. LXV. r. 1; the terms, so far as they are applicable to the present question, being exactly the same. The question is, whether the words of this rule, 'subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or judge,' enable the Court or judge to order costs as against persons who, up to the time when the Judicature Acts were passed and the orders came into operation, were not liable to be ordered to pay these costs. Of course, one must mention at the very first that the late Master of the Rolls, in *Ex parte Mercers' Company* (10 Ch. D. 481), decided, or expressed his opinion—for it does not quite appear how the matter arose in that particular case—that the effect of the Judicature Acts and of that order was to enable the Court, where it previously had no power to do so, to order respondents to pay costs, although the Act under which they were dealing did not give power to the Court so to do. That has been followed in several cases. . . . . But it is extraordinary that the point which we now have to consider . . . . does not seem really to have been argued before the Master of the Rolls. The parties in the position of the commissioners there wished to make out that the Judicature Acts and orders did give the judge power to refer the question of taxation to the taxing master, there having been an agreement between the parties upon which, as giving him more costs than he would otherwise get, the landowner was insisting. That fact, to my mind, detracts a good deal from the weight of the decision. But I also find that the late Master of the Rolls begins his judgment by saying, 'It appears to me that the question has practically been decided by the House of Lords in a recent case of *Garnett* v. *Bradley* (3 App. Cas. 944).' In my opinion that case does not govern the present case, and therefore there again I think the late Master of the Rolls was in error as regards the view which he there took. We must consider whether the decision in *Ex parte Mercers' Company* is right, and is to be followed or not on this occasion. Referring again to Ord. LXV. r. 1, I do not in any way enter into the question as to the authority to make such an order; but Ord. LV. of the Rules of the Supreme Court, 1875, which in this respect it follows, is to be considered as if it had been part of the Judicature Act, 1875, to which it was scheduled; and to my mind the question is what, having regard to the purport and object of the rules and orders made under the Judicature Act, is to be considered the true effect of these words, 'Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the

Court or judge.' What was the object of these rules and orders? Was it to give the Court a jurisdiction which did not previously exist, or was it not rather to regulate the manner in which the jurisdiction given to the Court, and which the Court had independently of this rule, was to be exercised?"

Sect. 23 of the Judicature Act, 1873, was then read, and *Dick* v. *Yates* (18 Ch. Div. 76); *Witt* v. *Corcoran* (2 Ch. Div. 69); and *Foster* v. *Great Western Railway Co.* (8 Q. B. Div. 515), were cited as showing the true construction of the Judicature Acts and orders was, that it was only intended by them to regulate the way in which costs were to be dealt with when power was given to the Court, or when, independently of the Act of Parliament, the Court had power to deal with costs.

Trustee raising improper objections to petition.

A trustee who raises improper objections to a petition may be disallowed all costs caused by such objections, and the expense caused by them may be set off against the costs to which he is properly entitled.

In *Re Wiseman* (18 W. R. 574) a petition was presented for the appointment of new trustees in addition to the surviving trustee of three, there having originally been three trustees. The surviving trustee opposed the petition on the ground of want of parties, and that it was presented by the tenant for life without the concurrence of the persons named as co-petitioners, and with a view to purchasing part of the trust property at an undervalue. The petition stood over in consequence; the necessary parties were joined, and proof of the concurrence of the co-petitioners was given. It was also shown that the surviving trustee insisted on the sale of part of the trust property, although the tenant for life offered to lend the required sum on mortgage. The tenant for life was the purchaser, and, on investigation of title, a tithe rent-charge, not mentioned in the conditions of sale, was discovered, in respect of which he claimed compensation; this the trustee refused, and threatened to rescind. The tenant for life questioned his right to rescind, but offered to waive the contract on the condition that there should be no sale, but that the money required should be raised by mortgage. On the petition coming on again, the right of the petitioner to the appointment of new trustees was not disputed.

James, V.-C., said: "In this case the petition as presented prays for the appointment of new trustees. I observe, when it was presented I was informed that several persons interested in remainder had not been served. The trustee was right to call my attention to that. Those persons should be before the Court, and that has been secured. He was right to say there are persons interested in

the estate who ought to be here. He raises, however, another case of a personal charge against the tenant for life, saying that his petition has been presented for an improper motive. That has led to a regular war of affidavits. The tenant for life has answered, and the trustee has replied, and great expense has been incurred, all arising out of the charge brought by the trustee. Now, though the petitioners are right and the trustee wrong, I cannot make the trustee pay the costs of the petition; but it is a case in which I can say he shall not have any costs of or occasioned by the affidavit which he filed; and with respect to the costs occasioned to the petitioner thereby, they will be taxed and set off against the costs properly payable to the trustee."

Irrelevant allegations.

In *Re Wills* (9 Jur. N. S. 1225) a married woman, by her next friend, presented a petition for the appointment of new trustees containing allegations of misconduct against her husband, who replied denying the allegations, and alleging misconduct against other persons. The Court ordered the next friend to pay the respondent's costs of answering the charges made against him, and the costs incurred in making those charges and in reference thereto, the respondent to pay the costs of the charges which he first introduced; the trust property bearing only the ordinary costs of a petition for the appointment of new trustees.

Tenant for life.

In *Re Thornton* (9 W. R. 475) a tenant for life in remainder who had come merely to look after his own interests, was not allowed his costs.

Estate.

But, as a rule, the costs of applications under this Act, being for the benefit of the estate generally, are borne by the general estate.

Thus, in *Re Parby* (29 L. T. 72), Vice-Chancellor Kindersley said, as to the costs of a petition for the appointment of new trustees, "I think the costs of the petition must come out of the *corpus*. Where an application by a tenant for life is clearly for his own benefit, I have been in the habit of making him pay the costs of it. But here the appointment of new trustees of the settlement is for the benefit of all parties interested under it in the fund." The costs of all parties were allowed as between solicitor and client.

Reversioners.

And where a legacy had been bequeathed to a sole trustee upon trust for A. for life, with remainder to B. and C., and B. and C. petitioned for the appointment of an additional trustee, the costs were not allowed to be paid out of the *corpus* of the fund, but were ordered to be paid by the petitioners. (*Re Brackenbury*, L. R. 10 Eq. 45.)

The fines, fees and expenses of new trustees to copyholds must

be borne by the tenant for life and remaindermen in proportion to their interest. (*Carter* v. *Sebright*, 26 Beav. 374.)

Vendor and Purchaser.

The costs of a vesting order on a sale should be borne by the vendor.

Costs of vendor and purchaser.

In *Bradley* v. *Munton* (16 Beav. 294) a vendor agreed to surrender, or procure someone to surrender, copyholds, the costs to be paid by the purchaser. It became necessary to present a petition under the Trustee Act, and upon the question of who should bear the costs thus occasioned Lord Romilly, M. R., said: "The costs of sale, in the absence of contract, fall on the vendor, and the costs of preparing the conveyance on the purchaser; but the costs of executing it must be paid by the vendor."

Here the contract is, that the vendor shall surrender, or procure some person to surrender, and that the costs of the surrender shall be borne by the purchaser. There is a difference between the mere act of surrender, and the steps which may be necessary for the purpose of procuring some proper person to perform that act. They are distinct, and the costs of procuring some proper person to surrender must on ordinary principles be paid by the vendor, and the costs of the surrender by the purchaser.

Where a person contracts to sell property, and afterwards devises it so that upon his death it becomes vested in infants, his estate must bear the costs of a suit rendered necessary by his own voluntary act; but this is not so if he dies intestate after the contract, leaving an infant heir. In such a case no costs will be given on either side. (*Purser* v. *Darby*, 4 K. & J. 41.)

"It seems to be now settled that where a suit is rendered necessary by a will made previously to the contract (*Wortham* v. *Dacre*, 2 K. & J. 437; *Hall* v. *Bushill*, 35 L. J. Ch. 381; *Murdin* v. *Patey*, 1 N. R. 566) no costs will be given on either side; where, however, the vendor after the date of the contract devises the estate in strict settlement, or to an infant, so that a suit is necessary to obtain a conveyance, his estate must bear the whole of the costs thereby occasioned." (Dart, 6th ed. p. 799.)

The proper person to apply for a vesting order of copyholds under section 28 is the purchaser, but all costs should be borne by the vendor. (*Ayles* v. *Cox*, 17 Beav. 584, *ante*, p. 44.)

If the lord of the manor appears to consent, his costs will not be allowed. (*Ib.*)

Railway company.

In *Re Nash* (4 W. R. 111) land was taken by a railway company from a transferee of a deceased mortgagee whose heir-at-law could

not be discovered. The railway company were ordered to pay the costs of a petition by the vendor for the appointment of a person to convey to the company. Vice-Chancellor Wood said, that "the Master of the Rolls in *Re South Wales Rail. Co.* (14 Beav. 418) seemed to think that needless expense had been incurred, it being the duty of the vendors to have had some one upon the rolls of the Court to represent the legal estate. These costs were either a matter of title or conveyance, and even if the order were taken in the form of directing A. B. to convey, the costs would be costs incurred by the vendor in respect of the conveyance. The matter would have been beyond doubt if the petition had prayed a vesting order; nor was there in reality any difference upon the form of the present application. The company must therefore pay the costs."

And *Re South Wales Railway Co.* was definitely overruled in *Re Liverpool Improvement Act* (L. R. 5 Eq. 282). A testator bequeathed leasehold property specifically. Some years after his death, and the death intestate of his executor, the property was taken by the corporation of Liverpool under the powers of their special Act, which incorporated the Lands Clauses Act. The corporation required administration *dè bonis non* to the testator to be taken out, which was accordingly done. It was held that the corporation were bound, under sect. 82 of the Lands Clauses Act, to pay the costs thus occasioned; and Lord Romilly, M. R., said: "Upon consideration, I have come to the conclusion that the case, *Re South Wales Railway Co.* (14 Beav. 418), was wrongly decided; I, therefore, overrule that decision, which, I believe, stands alone. I say this with regret, for I fear that I may have induced persons to follow the opinion there expressed without discussion, and by this means may have done injustice in that and other cases; but I think that the corporation must pay the costs of taking out administration."

Two funds.

On a petition for the appointment of new trustees of two trust funds subject to different limitations, the costs were ordered to be borne by the two funds rateably. (*Re Grant*, 2 J. & H. 764.)

"I think," said Vice-Chancellor Wood, "upon the principle that the appointment of new trustees is a step taken for the protection of the fund, the costs should be borne in proportion to the value of the funds. The appointment is in the nature of an assurance for the protection of the property, and, therefore, it seems fair that the costs should be borne rateably. The procedure is of a different character from that before the Lords Justices."

In *Ex parte The Bishop of London* (2 De G. F. & J. 14), the case before the Lords Justices referred to, it was held that the costs of a

petition presented by a bishop to have moneys paid into Court by several railway companies for land taken from the see applied in the purchase of other property, must be borne by the companies equally, except the cost of the *ad valorem* stamp, to which they must bear rateably according to the amount each contributed to the purchase-money.

Mortgagor and Mortgagee.

Lunatic mortgagee, beneficially entitled, his committee pays costs.

Where the mortgagee is beneficially entitled and has become lunatic, and the application is made by his committee, the costs may be paid out of the lunatic's estate.

Thus, in *Re Wheeler* (1 De G. M. & G. 434), on the petition of the committee of the estate of a lunatic mortgagee, and of a mortgagor of part of the estate, for such mortgagor to be at liberty to pay the mortgage money into Court, and for a vesting order, Lord St. Leonards, L. C., made the order, and on the question of costs said (*Ib.* p. 435):—

"*Ex parte Richards* (1 J. & W. 264), before Lord Eldon, seems to dispose of this case, and especially as the committee joins with the mortgagor in the petition. Although that case has been doubted, and certainly I originally should not have made such an order, yet, as I find both from the reported cases and the cases not reported, which I have searched for in the office, that it has been repeatedly followed, I do not feel at liberty to disturb it; but I think it contrary to principle, and opposed to the settled rule, that the costs occasioned by the mortgagees putting the mortgaged estate into settlement are to be paid by the mortgagor."

And see cases cited 1 De G. M. & G. 436, n. (in all of which the mortgagee was beneficially entitled to the mortgage money); *Hawkins* v. *Perry* (25 L. J. Ch. 656); and *Re Stuart* (4 De G. & J. 317).

In *Re Viall* (8 De G. M. & G. 439) a petition was presented by a purchaser under a decree in a suit for a vesting order of an estate vested in V., a person of unsound mind not so found. The mortgage money was unpaid. The order was made, and on the question of costs their lordships directed that 10*l.* should be deducted from the mortgage money, and paid to the petitioners, and that the rest of the costs should be costs in the cause.

Mortgagor should not appear.

On a petition by the committee of a lunatic mortgagee for a reconveyance of the mortgaged estates, the mortgagor, whether served or not, should not appear, and, if he does, will not be allowed his costs out of the lunatic's estate. (*Re Phillips*, L. R. 4 Ch. 629; cf. *Re Marrow*, Cr. & Ph. 146; *Re Rowley*, 1 De G. J. & Sm. 417; *ante*, p. 74.)

Mortgagee a trustee.

But if the lunatic mortgagee is only a trustee, the trust estate bears the costs, at all events where the mortgagor had no notice of the trust.

In *Re Jones* (2 Ch. Div. 70) property was mortgaged to two trustees of a settlement, without the mortgagor having notice of the trust, and one trustee died, and the survivor became lunatic, and new trustees of the settlement were appointed, but the mortgage was not transferred to them. On the presentation of a petition asking that the new trustees might be appointed to convey the property to the mortgagor who had given notice to pay off the mortgage, Lord Justice James thought that the costs should be paid by the trustees out of the trust funds. The application was really for the purpose of completing their title to the trust property.

In *Re Lewes* (1 Mac. & G. 23; 1 Hall & Twells, 113) a mortgage deed contained a declaration that the mortgagee was a trustee. Upon his becoming lunatic, it was held that the costs of proceeding under 1 Will. 4, c. 60, to obtain a reconveyance must be borne by the mortgagor.

Mortgagor.

Where a mortgagee became of unsound mind, although not so found by inquisition, upon an application in lunacy by the *mortgagor*, making the mortgagee a respondent to the petition, for a vesting order on payment into Court of the mortgage debt, it was held there was no jurisdiction to order the costs to be paid out of the mortgage debt, but that each party must bear his own costs. (*Re Sparks*, 6 Ch. Div. 361.)

"I think, now that the matter has been considered, there is something that has been overlooked in the former cases. This is an application exclusively under the Trustee Acts, and the Court has no jurisdiction in the matter except under those Acts. The 51st section of the Act of 1850 says what jurisdiction the Court is to have as to costs, and it enacts that the Court may order the costs and expenses of orders 'to be raised and paid out of or from the lands or personal estate, or the rents or produce thereof in respect of which the same respectively shall be made.' Here the estate in respect of which the application is made is the mortgagor's, which he wants to get vested in him discharged from the mortgage debt. We have jurisdiction to order the mortgagor to pay costs out of that estate, if we think right. When a petitioner under the Act comes to this Court, he submits himself to our jurisdiction as to costs, but I am not aware of any jurisdiction to make any one else pay costs. The respondent is brought here not by his own wish, and I do not know what authority we have to make a person pay the costs when he is brought here for the benefit of the

petitioner. . . . I do not see why the mortgagor should be relieved from payment of costs by the misfortune of the mortgagee, although it would not be right to make him pay the mortgagee's costs. There will, therefore, be no order as to costs on either side." (*Ib.*, p. 363, per James, L. J.; cf. *Re Rowley*, 1 De G. J. & S. 417, *ante*, p. 74; *Re Jones*, 2 De G. F. & J. 554.)

The costs of an application under this Act may be declared a charge on the inheritance.

Costs may be declared a charge on inheritance

Thus, in *Ex parte Davis* (16 Jur. 882), a trustee had been appointed under a power contained in a settlement of real estate in the place of a deceased sole trustee whose heir could not be found. A petition was accordingly presented, asking for a vesting order in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at four per cent., might form a charge on the inheritance. Vice-Chancellor Parker, after some hesitation, made the order asked.

And in *Re Crabtree* (14 W. R. 497), where an order had been made for the appointment of new trustees and the payment of the costs out of the trust estate, it being found that this consisted only of realty, it was asked that the costs, with interest at four per cent., might be a charge on the inheritance. Vice-Chancellor Wood allowed the application, and said that the order should be amended by the insertion of words directing the costs, when taxed, to be a charge on the inheritance, such charge to be raised by way of mortgage, the mortgage deed to be approved by the judge in chambers.

Commission concerning person of unsound mind.

52. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be directed.

53. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery

to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

Option to purchase assets of partnership.

Where two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner at a valuation, and the survivor exercised the option and paid the amount of the valuation to the executors of his partner, the Court refused, on petition or motion under this Act, to declare the infant heir a trustee of the freehold and copyhold land for the surviving partner, and that the question as against the heir must, to be determined, be brought before the Court by suit. (*Re Burt*, 9 Hare, 289.)

Option to purchase leasehold.

In *Re Weeding* (4 Jur. N. S. 707) a testator in his lifetime agreed to give an option to his lessee to purchase the fee, but the latter did not declare for the option until after the testator's death. It was held that an infant tenant in tail under the testator's will was not a trustee for the purchaser within the meaning of this Act, but that a bill for specific performance must be filed.

Purchase in son's name.

In *Collinson* v. *Collinson* (3 De G. M. & G. 409) lands were bought by a father in the name of a son (who became lunatic), under circumstances rebutting the presumption of advancement. A petition was presented by the father founded on a certificate of the master, under sect. 38. The Lord Chancellor (*Ib.* p. 414) says: "I must decline on an *ex parte* application to make a declaration, the effect of which will be to deprive the lunatic of an estate of which he is legal owner. He must be properly represented. The petitioner, if so advised, may file a bill." (The petitioner filed a bill, and the order was then made.) (Cf. *Devoy* v. *Devoy*, 3 Sm. & G. 403; 3 Jur. N. S. 79; *Stone* v. *Stone*, 3 Jur. N. S. 708.)

In *London & South Western Rail. Co.* v. *Bridger* (12 W. R. 678), Vice-Chancellor Wood observed: "If the person under an obligation to convey died intestate, so that by the act of God a conveyance became impossible, the purchaser could not have the heir-at-law declared a trustee under the Trustee Act, but a bill became necessary."

Death of vendor after a contract to sell.

And in *Re Carpenter* (Kay, 438) it was held that the infant heir of a person who had died intestate, leaving real estate which he had in his lifetime contracted to sell, was not a constructive trustee for the purchaser under this Act, unless he had been so declared by a decree of the Court. Vice-Chancellor Wood referred to sect. 29 of this Act, and sect. 1 of the Act of 1852, as showing that in cases of real estate the constructive trust must first have been declared by decree

of the Court, and said that the reason of that was that there might always be a question whether the contract could be enforced by a suit for specific performance, and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided. He referred to *Re Propert* (22 L. J. Ch. 948), in which, after he had declined to make an order, the Lords Justices also held that a lessee, who had mortgaged by way of underlease, and covenanted to stand possessed of the reversion of his lease in trust for the mortgagor and his assigns, was not such a trustee for an assign of the mortgagee to whom he had sold the underlease by virtue of a power of sale in the mortgage deed.

Covenant to surrender.

In *Re Collingwood* (6 W. R. 536), however, where A. covenanted "to surrender copyholds to the use of B., and in the meantime and until such surrender, that A. should stand seised of the copyholds upon trust for and to surrender the same unto B.," and went abroad without making any surrender; on the presentation of a petition under sects. 8 and 20 of this Act, Wood, V.-C., was at first inclined to think the case was one of those in which the Court declined to make orders under the Trustee Acts until a decree for specific performance had been made, but upon referring to the terms of the covenant, he considered that the case was brought within the Trustee Act, 1850, as a case of express trust, and made the order as prayed.

Mortgage by sub-demise.

In *Re Propert* (22 L. J. Ch. 948) leases were granted to A. B. for a certain term, and demised by him to C. D. for the term, less the last ten days. C. D. mortgaged to E. F. and Company, and covenanted to assign the last day of the terms. The mortgagee sold to G. H., who bought the ground-rents of A. B.; and C. D., the mortgagor, being abroad, G. H. petitioned that he might be declared a trustee of the last day.

Knight-Bruce, L. J., said: "Vice-Chancellor Wood has already doubted on this point, and certainly, I think, with very good ground. What is asked is in effect this: to make a decree for the specific performance of the covenant, without the defendant, or the person who should be defendant in the suit, having any notice of what is done. . . . I never heard before that a covenant to assign made the covenantor a trustee; and if it were so, I see no reason why a man who has covenanted to pay debts should not be held a trustee of his own estate for the payment of his own debts. I think that the petition must be dismissed."

In *British Empire Mutual Assurance Company* v. *Sugden* (47 L. J. Ch. 691), a mortgage by sub-demise of leaseholds contained an absolute declaration of trust by the mortgagor of his reversion.

The mortgagor having refused to convey, judgment for foreclosure of the equity of redemption in the premises and of the reversionary term was given, but Vice-Chancellor Hall refused to make a vesting order as to the reversion until the decree was made absolute.

Powers of Court of Chancery to extend to property in the colonies.

54. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland).

Ireland.

In *Re Lamotte* (4 Ch. Div. 325) the surviving trustee of lands in Ireland and other property became lunatic, and an order was made upon a petition, instituted both in Lunacy and in the Chancery Division, appointing new trustees, and vesting the Irish land in them.

In *Re Taitt* (W. N. 1870, p. 257), on a petition for the appointment of new trustees, and a vesting order of (*inter alia*) land in Ireland, the Master of the Rolls, after some hesitation, followed *Re Hewitt* (6 W. R. 537). In *Re Hewitt*, Vice-Chancellor Kindersley expressed an opinion that the Court of Chancery in England, in matters not in Lunacy, had concurrent jurisdiction in Ireland.

In *Re Smyth* (34 W. R. 493) a petition intituled both in Lunacy and in the Chancery Division was presented, asking for the appointment of a new trustee in the place of a lunatic, and for an order vesting lands in Ireland. Lord Justice Cotton said: "We can, I think, make the order asked for. We can appoint the new trustee under our jurisdiction in Lunacy, and make the vesting order under our jurisdiction in Chancery."

Canada.

In *Re Schofield* (24 L. T. 322), a testator who was seised of lands in Canada devised them to two trustees on certain trusts. The two trustees being dead, and the heir of the survivor out of the jurisdiction, the Court made an order under this section vesting the lands in the person beneficially entitled.

In *Re Groom* (11 L. T. N. S. 336), A. purchased an estate in Canada, his conveyance being confirmed by the personal representative of a mortgagee, in whose lifetime the mortgage was paid. A vesting order of the outstanding legal estate was made.

Powers given to Court of Chancery may be exercised

55. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall and may be exercised in like manner and are hereby

given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland. by that Court in Ireland.

56. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to Her Majesty (except Scotland and Ireland). Powers of Lord Chancellor in lunacy to extend to property in the colonies.

In *Re Hodgson* (11 Ch. Div. 888) one of the trustees of an estate which was being administered by the Court became of unsound mind, and an order was made under sect. 5 of this Act appointing a person to concur with the other trustee in transferring into Court shares and stock in two Irish railways. The registrar considered that there was no jurisdiction, as this section excludes Irish property from Lunacy jurisdiction. It was asked that a new trustee of the Irish railway stock and shares might be appointed along with the existing trustee for the purpose of transferring them into Court under sect. 11 of the Act of 1852, Irish property being subject to the Chancery jurisdiction by sect. 54 of the Trustee Act, 1850, it being apprehended that if a new trustee was appointed without limitation he would have to be made a party to the suit. James, L. J., however, observed (*Ib.* p. 890): "When the stocks have been transferred into Court he will be a trustee with no duties to perform, with no trust property vested in him, and subject to no liability. I do not think he can be a necessary party to the suit." An order was accordingly made appointing the person named to concur with Greene, the existing trustee, in the transfer to a new trustee of the Irish stock and shares, with a direction to him to concur with Greene in transferring them into Court. Irish property.

In *Re Lamotte* (4 Ch. Div. 325) an order was made upon a petition instituted both in Chancery and Lunacy appointing new trustees and vesting Irish land in them.

57. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland. Powers in lunacy may be exercised by Lord Chancellor of Ireland with respect to property in Ireland.

With respect to lands in Ireland the Lord Chancellor (Truro), in

Re Davies (3 Mac. & G. 278), said that he thought that, having regard to this section, it was not intended by the 54th section to give the Lord Chancellor of Great Britain, sitting in Lunacy, a concurrent jurisdiction over lands in Ireland.

Short title of the Act.

58. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

Commencement of Act.

59. *And be it enacted, that this Act shall come into operation on the first day of November one thousand eight hundred and fifty.*

Act may be amended, &c.

60. *And be it enacted, that this Act may be amended or repealed by any Act to be passed in this Session of Parliament.*

These two sections (59 and 60) were repealed by the Statute Law Revision Act, 1875.

TRUSTEE EXTENSION ACT, 1852.

15 & 16 Vict. c. 55.

An Act to extend the Provisions of "The Trustee Act, 1850." [30*th June*, 1852.]

Whereas it is expedient to extend the provisions of the Trustee Act, 1850: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

Court of Chancery may make an order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale.

1. That where any decree or order shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

Extent of section.

This section applies to sales under the Partition Acts, 1868 and 1876, and is not limited to cases of persons under disability. (*Beckett* v. *Sutton*, 19 Ch. D. 646.)

"It has been suggested," said Mr. Justice Chitty (*Ib.* p. 649), "that the first section of the Act of 1852 applies only to cases where the person seised, possessed, or entitled, is under disability. But the language of the section is as clear as can be. It says, that when 'any' decree or order for sale has been made, 'every person' seised, possessed, or entitled, being a party to the suit, or bound by the decree or order, shall be deemed to be seised, possessed, or entitled, upon a trust: but then a doubt of the general application of the section appears to have arisen from the language of the last clause, which says that the vesting order authorized by the section 'shall have the same effect as if such person so seised, or possessed, or entitled, had been free from all disability.' The purport of that part of the section is merely to declare the effect of the vesting order, and the result is simply this: the Legislature says, in effect, there may be among the persons bound by the decree or order some who are under disability; in such cases the vesting order shall have the same effect as if the persons who are under disability were free from disability. In other words, to avoid any question as to the operation of the vesting order, the language of the last clause of the section is properly addressed to cases of persons under disability; the Legislature saying that the effect of the vesting order shall be the same as if such person were seised, possessed, or entitled free from all disability. The clause in fact merely describes what the effect of the order is to be in a certain hypothetical case. That is the view I take of the section; and, as I have already said, I refuse to adopt the construction which would by implication exclude rules under the Partition Acts from the operation of that section."

This section removes the difficulty felt in *Weston* v. *Filer* (5 De G. & Sm. 608), that sect. 29 of the Trustee Act, 1850, only applied where a sale was directed for payment of debts.

In *Wake* v. *Wake* (17 Jur. 545) it was held that this section applied to the case of property in which infants and possible unborn children were interested, although the decree for sale of such property was made before the passage of this Act, and the purpose of the sale was not confined to payment of debts.

Application to the Court under this section is now made by summons in chambers under Ord. LV. r. 11 (8).

Estate in Person of Unsound Mind.

In *Herring* v. *Clark* (L. R. 4 Ch. 167) the legal estate in land sold under the order of the Court was vested in a person of unsound mind, but not found lunatic. Doubts were raised, having

regard to *Re Ormerod* (3 De G. & J. 249); *Barber* v. *Dawson* (6 N. R. 346); and *Jeffryes* v. *Drysdale* (7 Jur. N. S. 667), whether the order could be made by a Vice-Chancellor under this section, or should be made in lunacy under sect. 3 of the Act of 1850. Lord Hatherley, L. C., and Selwyn, L. J., made the order in Chancery. (Cf. *Re Stamper*, 46 L. T. N. S. 372; *Re Bloomar*, 2 De G. & J. 88; and *Re Molyneux*, 10 W. R. 512.)

Power to make an order for vesting the estate on refusal or neglect of a trustee to convey or release.

2. That sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

Attempted extortion.

Under this section a vesting order may be made to defeat an attempt at extortion on the part of a trustee. Thus, in *Re O'Donnell* (19 W. R. 522), a trustee refused to join in a conveyance unless he was paid 50*l.*, and an order vesting his interest in another trustee was obtained.

Neglect.

In *Re Crowe's Mortgage* (L. R. 13 Eq. 26) a mortgagor had covenanted to surrender copyholds. A transferee of the mortgage requested him to surrender them, and had a memorandum of surrender tendered to him for execution, but he neglected to do so for twenty-eight days, and still refused to surrender the copyholds.

The transferee accordingly presented a petition that the copyholds might vest in him for all the estate of the mortgagor, subject to the equity of redemption, and it was urged in his behalf that the contract being executed by the payment of the mortgage money, and the mortgagor's covenant, the mortgagor had become a trustee for the mortgagee; and that a vesting order might be made without a suit for specific performance (*Re Cuming*, L. R. 5 Ch. 72); and that the mortgagor was in the position of a recusant trustee, and that the fact that he could not be found, and had consequently not been served with the petition, was immaterial. (*Re Baxter's Will*, 2 Sm. & G. App. 5.) Lord Romilly, M. R., held that the order might be made, and service on the mortgagor dispensed with.

Refusal.

In *Knight* v. *Knight* (W. N. 1866, p. 114; 14 L. T. 161) a wife filed a bill to have a mortgage of leasehold premises, which had been made in the names of her husband and herself, although the money advanced was her separate property, secured for her benefit. Her husband was declared a trustee, and ordered to assign the mortgage for her benefit, but refused to do so. A motion for an order that he should execute an assignment within four days, or for a vesting order, was made to stand over for twenty-eight days, and then a vesting order was made.

In *Re Grayson* (27 W. R. 534; W. N. 1879, p. 52) a testator devised an estate to trustees upon trust for A. for life, remainder upon trust for A.'s eldest son for life, with remainder upon trust to convey to A.'s right heirs male, and A. died leaving his eldest son surviving. The son contracted to sell, but the trustees refused to convey. Fry, J., thought he was entitled to a vesting order, "on the ground of the general rule that the heir of a man named in a will was to be ascertained as early as possible."

Refusal.

By the 30th section of the Conveyancing Act, 1881, sub-s. 1, where an estate of inheritance in any tenements or hereditaments "is vested on any trust or by way of mortgage in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him."

Sect. 45 of the Copyhold Act, 1887 (which was passed on the 16th of September, 1887), provides that the 30th section of the Conveyancing Act, 1881, "shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage."

"The best construction which I am able to put on the two sections is this—that everything which is done between the dates at which

the two Acts respectively came into operation must be taken to have been done under the earlier Act. But when, on the 16th of September, 1887, the Copyhold Act was passed, sect. 30 of the Conveyancing Act ceased to have any application to copyholds. . . . If the executors had dealt with the property before the Copyhold Act was passed, their disposition would have been valid. But no disposition having been made by them before the passing of the Copyhold Act, it seems to me that they have no longer any power to deal with it, and that the devolution of this estate must be traced as if the Conveyancing Act had never been passed." (*Re Mills' Trust*, 37 Ch. D. 312, per North, J., p. 315.)

And accordingly, in *Re Mills*, a petition based on the refusal of executors to convey was dismissed.

The Court of Appeal affirmed the decision on the ground that there was no evidence of a wilful refusal by the trustee, declining to express an opinion on the construction of the Act.

Power to make an order for the transfer, or receipt of dividends, of stock in name of an infant trustee.

3. That when any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint.

In *Cramer* v. *Cramer* (5 De G. & Sm. 312), it was held that the Court had no authority to make a vesting order with regard to stock held by an infant sole trustee who was out of the jurisdiction. "The case of an infant out of the jurisdiction would be in the same class as that of a lunatic trustee, but a lunatic trustee would not be under the Court of Chancery, but under the jurisdiction of the Lord Chancellor. It would be impossible to say that a lunatic was less a lunatic by reason of his being out of the jurisdiction." This section meets the difficulty brought to notice in that case.

Infant beneficially entitled to funds

In *Re Harwood* (20 Ch. D. 536), R. Harwood died intestate in 1869, leaving a widow and two infant children. Letters of ad-

invested in joint names.

ministration were granted to the widow, who invested the one-third share of each of the children in the purchase of consols in the name of the child, herself, and her father. On the death of the widow a petition was presented under the Trustee Acts by the infants and their grandfather, asking that the right to transfer the consols might vest in the latter alone, and that he might be at liberty to transfer them into Court to the account of the infants. Hall, V.-C., said (*Ib.* p. 537), "I think the case comes within the words of the 3rd section of the Act of 1852. Whether they were intended to cover a case like the present is another question, but I shall make the order."

In *Sanders* v. *Homer* (25 Beav. 467; 6 W. R. 476), the sole trustee of money for A. and B. invested it in stock in the joint names of himself and B., an infant. After the death of the trustee and A., the infant was held to be a trustee within the Trustee Acts, and a vesting order was made.

In *Rives* v. *Rives* (W. N. 1866, p. 144), money sent to England by the executors of an American testator, was by mistake invested in the name of the infant beneficiaries. A declaration was made that the investment in the name of the infants was made by mistake, and that they were trustees within the meaning of the Trustee Act, 1850.

In *Re Westwood* (6 N. R. 316), a sum of stock stood in the name of an infant who was absolutely entitled. In order to obtain payment, a petition was presented under the Trustee Acts, on which an order was made declaring the infant a trustee, and appointing a person to transfer the fund into Court (6 N. R. 61). The bank refused to act on this order, and on the matter being brought before him, Stuart, V.-C., said (6 N. R. 316):

"The infant being absolutely entitled to the stock could not be a trustee within the meaning of the Act. He must therefore discharge the order, but should give leave to amend the petition by intituling it, 'In the matter of the Act of 1 Will. 4, c. 65,' and by making the guardians co-petitioners, and subject to these amendments should make an order under the 32nd section of that Act, directing payment of the dividends to the guardians."

In *Gardner* v. *Cowles* (3 Ch. D. 304) a testator bequeathed a legacy of 1,000*l.* to each of his children, and then directed his executors to stand possessed of his residuary estate in trust for all his children; the shares of those under age to be invested in consols and paid to them at twenty-one or marriage. There were trusts for maintenance, education, &c. The executors invested the legacies and shares of two of the infants in consols in their own and the infants' names, and died leaving the infants surviving.

A petition was presented under the Trustee Acts praying that the infants might be declared trustees within the meaning of the Acts, and that the legal personal representative of the last surviving trustee might be appointed to transfer the fund into Court.

Hall, V.-C., was of opinion that the definition of "trust" in sect. 2 of the Trustee Act, 1850, "is sufficient to include the case of consols which have been transferred into the name of an infant who is the sole beneficial owner of them, but subject to some provision or direction in regard to maintenance or otherwise, which is vested in somebody else, and which provision or direction cannot, in the events that have happened, be practically operative or performed so long as the consols remain in the name of the infant. By the word 'practically' I mean practically performed according to the intention of the creator of the disposition, though there may be some statutory provision which may be resorted to for the purpose of accomplishing the same object in another form and mode. Where a fund has been so transferred it is not unreasonable to hold that this definition extends to such a case, so as to allow the fund, through the machinery of the Acts of Parliament, to be brought back again into the name, and placed in the position it ought to be in, and would have been in but for the irregularity or impropriety of putting it into the name of the infant."

In *Re Findlay* (32 Ch. D. 221), an infant was entitled to a legacy under the will of her father, a domiciled Scotchman. The *curator bonis* appointed by the Court of Sessions invested it in the purchase of New Zealand stock, transferable at the Bank of England in the sole name of the infant. The Court of Session authorized the *curator bonis* to advance a sum not exceeding 100*l.* in all, out of capital, to supplement the infant's income. A petition was presented, asking that the right to transfer 100*l.* of the New Zealand stock might vest in him, and that he might be at liberty to sell and transfer the same, and to apply the proceeds for the maintenance and education of the infant, and that the dividends on the residue of the stock might be paid to him, he undertaking to apply the same towards the infant's maintenance and education. North, J. (p. 224), says, "I think I may make the order asked for; though I am not sure whether the bank may not object to act on it. *Gardner* v. *Cowles* (3 Ch. D. 304), is an authority directly in point, subject to this difference, that there the will contained a clear trust for the maintenance of the infant, which gave her some interest as trustee. In the present case the will does not contain any words clearly corresponding to those in *Gardner* v. *Cowles*, but the order of the Scotch Court seems to me to have put a construction on the

will which gives it the same effect as if an express trust for maintenance had been found in it. I think the decision of the Scotch Court, whether it was founded on this construction of the will or on their inherent jurisdiction, makes the case sufficiently like *Gardner* v. *Cowles* to justify me in following it. I will appoint Mr. Woods (the grandfather) guardian, and declare the infant a trustee, and make the vesting order as asked."

The bank, however, objected to act on the order (so far as it declared the infant a trustee, and directed that the right to transfer the 100*l.* stock should vest in the guardian), on the ground that there was no jurisdiction to declare the infant a trustee within the meaning of the Trustee Acts, or to make any order on that footing, and this part of the order was by consent abandoned. (32 Ch. D. 642.)

Where money has been invested by a father or person *in loco parentis* in the name of an infant, and evidence is forthcoming to rebut the presumption of advancement, the infant may be declared a trustee. (*Devoy* v. *Devoy*, 3 Sm. & G. 403; 3 Jur. N. S. 79; *Stone* v. *Stone*, 3 Jur. N. S. 708. But see *Collinson* v. *Collinson*, 3 De G. M. & G. 409, *ante*, p. 98.)

On neglect to transfer stock, or receive dividends, or to sue for chose in action or interest for twenty-eight days, vesting order may be made.

4. That where any person shall neglect or refuse to tranfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

Refusing trustee need not be served.

It is not necessary that a petition for the vesting of funds in a person absolutely entitled where a trustee has neglected to transfer them for twenty-eight days should be served on such trustee either under sect. 23 of the Trustee Act, 1850, or for the purpose of obtaining a preliminary order under this section. (*Re Mount*, 24 L. T. N. S. 290, *ante*, p. 38.)

In *Re Holbrook* (8 W. R. 3; 5 Jur. N. S. 1333), an order was made

on a petition that T. H. should join in transferring a sum of stock standing in the name of himself and his co-trustees into the names of new trustees appointed by the same order. He neglected to transfer for upwards of twenty-eight days after service of the order, and a motion for an order under this section was made. The Master of the Rolls thought it made no difference that the motion was in a matter and not in a cause, and made the order.

An order cannot be made under this section in such a way as to deal with a larger subject-matter than the order disobeyed. (*Shynner* v. *Pelichet*, 9 W. R. 191.)

On like neglect by executor to transfer stock or receive dividends similar order may be made.

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Bank of England and companies to comply with such orders.

6. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms

of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Under this section and sect. 26 of the Act of 1850 an order was made in *Re Peacock* (14 Ch. Div. 212), vesting the right to call for a transfer of unauthorized investments either to the newly-appointed trustees or to purchasers. (*Ante*, p. 41.)

As to the binding effect of orders in chambers on the bank, see *Re Tweedy* (28 Ch. Div. 529), *ante*, p. 68.

This section removes the doubt that was felt in *Re Smyth* (4 De G. & Sm. 499); as to the effect of sect. 35 of the Act of 1850, *ante*, p. 69.

Indemnity to Bank and companies obeying.

7. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same.

Doubt or question of principle.

Though the Bank of England might be indemnified by this section, it has always been the custom to mention cases of doubt, and where a principle is involved to the Court. (*Gardner* v. *Cowles*, 3 Ch. D. 304.)

Thus, in one case, Vice-Chancellor Stuart said: "If the bank considered that the Court had, through inadvertence or otherwise, made an erroneous or defective order, it did right in requiring the point to be brought before the Court for consideration." (*Re Westwood*, 6 N. R. 316.)

Order in chambers.

Thus, the bank was held justified in raising the question of the binding effect of a vesting order in chambers. "Taking all the Acts of Parliament together, and considering the recital in sect. 16

of the Act of 1855, and the effect of the general order of the 12th of November, 1856, that was made under that Act, and the course of practice which has prevailed ever since, it is, at all events, doubtful whether the jurisdiction given by the Trustee Act, 1850, was intended by the Legislature to be exercised in chambers, except in cases provided for by general order. Having regard to this doubt, I think we ought to say that such applications ought to be made by petition or motion in open Court, unless and until some general order is made prescribing the conditions under which, and the safeguards with which, such orders shall be made, if they are made in chambers at all." (*Frodsham* v. *Frodsham*, 15 Ch. Div. 317, per James, L. J., p. 325.)

"*Frodsham* v. *Frodsham* seems to have been misunderstood. What the Court of Appeal really decided was this:—they said, that where it was desired to proceed under the statutory jurisdiction conferred upon the Court by the Trustee Act, 1850, the proceedings ought to be initiated by petition or motion in open Court, in the absence of any general order providing for such proceedings being commenced in Chambers." (*Re Moate*, 22 Ch. D. 635, per Chitty, J., p. 638; and see *Re Tweedy*, 28 Ch. Div. 529, *ante*, p. 68.)

Inconvenience.

In *Shynner* v. *Pelichet* (9 W. R. 191), it was proposed to order the bank to pay half the dividends on a sum of stock to a plaintiff, and half to a defendant, but the bank's objection that confusion in the public accounts would be caused thereby, was allowed to prevail.

In *Re Glanville* (W. N. 1877, p. 248), two new trustees were appointed, and a vesting order made, but one of them died before the transfer took place, and the bank declined to act upon the order unless a new trustee was appointed, or the words "or the survivor of them" added to the order. As the trust fund was only 108*l.*, and to present another petition would be expensive, the Vice-Chancellor ordered the words to be added.

Bank.

Order should show on face case within Act.

When an order is made under the Trustee Acts to be acted on by the Bank of England, the order should show that the case comes within the Acts.

Thus, in *Re Ellis* (24 Beav. 426), the executor of a surviving trustee had not proved the will, and had neglected to transfer the fund at the request of new trustees appointed out of Court, and upon petition an order was made vesting the right to transfer the fund in the new trustees upon the allegation that there was no legal personal representative of the surviving trustee. On the bank objecting to the order, Lord Romilly, M. R., said, "Let the order be amended by stating that E. (the executor of the last surviving trustee) has neglected to transfer for twenty-eight days; that will remove all question."

And in *Re Mainwaring* (26 Beav. 172), on the bank objecting to act on an order, because it did not appear on the face of the order that the case came within the Act, a recital that the trustee (in whose place a new trustee had been appointed) was resident out of the jurisdiction was ordered to be inserted.

Power to appoint new trustees in lieu of persons convicted of felony.

8. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the Court to appoint new trustees where there is no existing trustee.

9. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order.

See notes to Act, 1850, s. 32 (*ante*, p. 54), and *Re Orde* (24 Ch. Div. 271), cited in note to next section.

Chancellor may make orders for appointment of trustees without it being necessary that it should be made in Chancery, &c.

10. In every case in which the Lord Chancellor intrusted as aforesaid has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery as well as in

Lunacy, or be passed and entered by the registrar of the Court of Chancery.

Jurisdiction in lunacy.

This section removes the doubt that was felt in *Re Waugh* (2 De G. M. & G. 279), whether the Lords Justices, intrusted by warrant under the sign manual to make orders in lunacy, had jurisdiction to make a vesting order under the Trustee Act in a case where the heir of the survivor of two trustees was of unsound mind.

In *Re Lamotte* (4 Ch. Div. 325), a petition was presented by the *cestuis que trust* under a marriage settlement for the appointment of new trustees and a vesting order, part of the property consisting of real estate in Ireland, the trustee for sale of which was insane, James, L.J. (*Ib.*, p. 326), observes, "We have clear jurisdiction in lunacy to appoint new trustees in place of the lunatic. We have by special order been appointed additional judges of the Chancery Division for the purposes of application connected with lunacy, and having both jurisdictions, we can at once make the vesting order prayed."

A petition for the appointment of new trustees in the place of trustees, of whom two were dead, and one of the survivors was a person of unsound mind not so found by inquisition, but not asking for a vesting order, was allowed to be presented in chancery and not in lunacy. (*Re Vickers*, 3 Ch. D. 112.)

In *Re Owen* (L. R. 4 Ch. 782) a petition was presented in lunacy for the appointment of new trustees where the surviving trustee was a person of unsound mind not so found. Lord Justice Giffard said he was of opinion the 10th section of the Trustee Extension Act, 1852, was an express provision that the application might be in lunacy only. He thought there was no reason for the existence of any doubt. The order would be as prayed, and drawn up in lunacy only.

In *Re Orde* (24 Ch. Div. 271) a testator became lunatic subsequently to the date of his will, and outlived the trustees therein named. An order appointing new trustees of the will was made by the Court sitting in lunacy.

As to powers of persons intrusted with the care of lunatics.

11. That all the jurisdiction conferred by this Act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Under this section a new trustee of Irish railway stock and shares was appointed in place of a lunatic to concur with the other

trustee in transferring them into Court. (*Re Hodgson*, 11 Ch. Div. 888, *ante*, p. 101.)

As to the jurisdiction of the Lords Justices in respect of lunatics, see the Judicature Act, 1875, s. 7. (*Ante*, p. 9.)

Act to be construed as part of Trustee Act, 1850.

12. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

All orders made under Trustee Act, 1850, or this Act to be chargeable with the same stamp duty as deeds of conveyance.

13. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

An order of the Charity Commissioners, by which new trustees of a charity are appointed, and the property of the charity vested in them is chargeable under sect. 8 of the Stamp Act, 1870, with duty both in respect of the appointment and the vesting order, and does not come within the provision in sect. 78 as a conveyance or transfer made for effectuating the appointment of a new trustee. (*Hadgett* v. *Commissioners of Inland Revenue*, L. R. 3 Ex. D. 46.)

The charges under 33 & 34 Vict. c. 97 are:—

(1) Order appointing new trustees, one stamp of 10*s*.

(2) Order appointing new trustees and vesting in them the right to transfer stock, one stamp of 10*s*.

(3) Order appointing new trustees and vesting land in them, two stamps of 10*s*. each.

(4) Order appointing new trustees, and vesting in them the right to sue for choses in action, two stamps of 10*s*. each.

When the choses in action are in the nature of a mortgage, bond,

debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment, and the total amount thereby secured is under 2,000*l.*, an *ad valorem* stamp at the rate of 6*d.* per 100*l.* is to be substituted for the second stamp of 10*s.*

In no case where new trustees are appointed and a vesting order made, are more than two 10*s.* stamps required. No stamp is required in respect of any order merely vesting the right to call for a transfer of and to transfer any stock. (W. N. 1871, p. 112, pt. 2.)

TRUSTEE ACT, 1888.

51 & 52 Vict. c. 59.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees.

[24th December, 1888.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Short title, extent, and definition.

1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Receipt of money by solicitor as agent.

2.—(1.) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting

such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act, 1881; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee. 44 & 45 Vict. c. 41.

(2.) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee.

(3.) This section shall apply only where the money or valuable consideration or property is to be received after the passing of this Act.

This section removes the difficulty resulting from the decision in *Bellamy and Metropolitan Board of Works* (24 Ch. Div. 387), where Lords Justices Cotton and Bowen held (*dissentiente* Baggallay, L. J.,

and overruling the decision of Mr. Justice Kay), that trustees of real estate, with a power to sell and give receipts, could be required to attend in person to receive the purchase-money, or to authorize the purchasers to pay it into a bank to the joint account of the trustees; that the production of the executed conveyance by their solicitor did not entitle the vendors to require payment to him, and that the 56th section of the Conveyancing Act, 1881, had no application.

This case was followed in *Flower and Metropolitan Board of Works* (27 Ch. D. 592), where trustees for sale authorized the payment of the purchase-money to one of themselves. This section, however, only authorizes payment of purchase-money to a solicitor.

As to the employment of agents by trustees, see *Speight* v. *Gaunt* (9 App. Cas. 1).

Depreciatory conditions on sales by trustees.

3.—(1.) No sale made by a trustee shall be impeached by any cestui que trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section shall apply only to sales made after the passing of this Act.

Formerly purchaser might object to title on the ground of depreciatory conditions.

In *Dunn* v. *Flood* (28 Ch. Div. 586) trustees for sale under a will put up for sale by auction, in small lots, land, with conditions providing that the title should commence with a conveyance to the testator ten years old; that every recital in any abstracted document should be conclusive evidence of the fact stated; and that the lots were sold "subject to existing tenancies, restrictive covenants, and all covenants and quit-rents (if any) affecting the same;"

and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The only restrictive covenants were the same as those set forth in the general conditions. It was held that the conditions were, under the circumstances, needlessly depreciatory, and that a purchaser was entitled to take that objection; and an action by the trustees for specific performance of the contract for sale was dismissed.

Loans by trustees.

4.—(1.) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property on which the trustee can lawfully lend.

Old rule two-thirds on land, one-half on house property.

The former rule was that for trustees "to advance two-thirds is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating." (*Stickney* v. *Sewell*, 1 My. & Cr. 9, p. 15.) And upon house property the rule was not to lend more than one-half. (*Fry* v. *Tapson*, 28 Ch. D. 268, p. 279; Lewin on Trusts, p. 325.)

And in *Re Olive* (36 Ch. D. 70) trustees who had invested trust-money on mortgage of leasehold property, without a proper valuation, to the extent of two-thirds of the real value, which subse-

quently became depreciated, were held liable to make good the loss thereby occasioned.

In *Stretton* v. *Ashmall* (3 Dr. 9, p. 12), Vice-Chancellor Kindersley said, "It has been decided in many cases that the duty of trustees is this, not as a fixed rule liable to no variations, but as a rule of ordinary discretion, not to lend more than two-thirds of the actual apparent value, even when the property is land of an apparently fixed and permanent value; but if it is property of a fluctuating character, they ought not to lend upon property of less than twice the amount lent." (See also *Macleod* v. *Annesley*, 16 Beav. 600; *Godfrey* v. *Faulkner*, 23 Ch. D. 483.)

Independent valuer.

Trustees should not advance money without a valuation from an independent valuer.

In *Ingle* v. *Partridge* (34 Beav. 411), where trustees lent trust-money on mortgage, on the faith of a valuation made by the mortgagee's valuer, they were held personally liable upon the security proving insufficient.

Employment of interested valuer.

In *Fry* v. *Tapson* (28 Ch. D. 268) trustees empowered to invest on mortgage lent, under the advice of their solicitors, 5,000*l.* upon mortgage of a freehold house and grounds at Liverpool, valued to them at from 7,000*l.* to 8,000*l.* The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors that a London surveyor should be employed, who had introduced the security to them, and was in fact the mortgagor's agent, with a pecuniary interest in the completion of the transaction. The mortgagor became bankrupt, and the property was insufficient to realize the sum advanced. It was held that the trustees were liable to replace the sum advanced, with 4 per cent. interest from the time of the loan. "The facts," said Mr. Justice Kay (*Ibid.*, p. 279), "show strongly the wisdom of the general rule that not more than one-half the estimated value should be lent by trustees upon house property. . . . But the most imprudent act was to employ Mr. Kerr to value for the mortgagees, and to accept his report as a sufficient evidence of the value. He was a London surveyor, not known to have had any of that local knowledge which was so important in this case, and his employment was inexpedient for that reason. (*Budge* v. *Gummow*, L. R. 7 Ch. 719, 722.) He was employed by the mortgagor to find a borrower. He was interested in doing so. His commission of 75*l.* depended upon his success."

Although this section obviates the necessity of employing a local valuer, it would seem as necessary as formerly to employ one unconnected with the mortgagor.

This section does not appear to relieve trustees who lend upon speculative investments.

Unfinished building estate.

In *Smethurst* v. *Hastings* (30 Ch. D. 490), Theresa Smethurst was tenant for life under a settlement containing an ultimate trust, in the events that happened, for her testamentary appointees. The trustees had power to invest on leasehold securities, and shortly before the death of the tenant for life invested the trust funds with her consent on eleven separate sub-mortgages of leasehold houses, unfinished and unlet, on a building estate of which the roads and drainage were in a defective condition. The investment was made without an independent or reliable valuation, and more than half the value of the house was lent on each sub-mortgage. On the death of the tenant for life, her executors, finding the sub-mortgages an insufficient security, brought an action against the trustees to make them personally liable for the deficiency. Vice-Chancellor Bacon held, that "the investment of the several sums comprising the aggregate trust funds upon eleven mortgages of houses which would not be immediately occupied, and from which rents were not secured or receivable, was a breach of the duties of trustees and a violation of the rule which requires trustees to deal with their trust funds as a prudent man would deal with his own property."

The trustees were ordered to pay the whole sum due on the securities, with five per cent. interest from the date of investment, after giving credit for all interest paid, and the sub-mortgages were ordered to be transferred to the trustees.

Brick field.

In *Learoyd* v. *Whiteley* (12 App. Cas. 727), trustees empowered to lend upon "real securities" invested trust money on the security of a brick field, being advised by competent valuers that the property was a good security for the sum invested. The valuer's report was "not such a document as a lender of ordinary prudence would have ventured to act upon." (*Ibid.*, p. 735.) The trustees *bonâ fide*, but without making further inquiry, acted upon the report. It was held that, the security having failed, they were liable to make good the money with interest at four per cent. from the date of the last payment.

By this decision the case of *Re Pearson* (51 L. T. N. S. 692) was overruled.

Erroneous assumption.

In *Walcott* v. *Lyons* (54 L. T. N. S. 786), trustees invested out of trust money 3,800*l.* upon mortgage of a house, occupied by the owner, B., who carried on a school in partnership with S. By the deed of partnership B., as owner of the freehold, was to receive 300*l.* a year out of the profits of the school, and in the event of his death S. was to take a lease at the same rental. The advance was made in reliance upon the report of a surveyor, instructed by one

of the trustees in his capacity as solicitor to B., such report being made for the purpose of a previous mortgage transaction which fell through. By it the property was estimated at 5,800*l.*, on the assumption that a responsible tenant would be willing to take a lease at 400*l.* per annum. On the security proving insufficient, it was held that the trustees must restore the trust fund.

(2.) No trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.

An extension of the Vendor and Purchaser Act (37 & 38 Vict. c. 78), s. 2 (1), and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 3 and 66.

(3.) No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

The use of the word "only" in this section should be noticed.

Liability for loss by reason of improper investments.

5.—(1.) Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2.) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

Formerly, if trustees invested moneys on an unauthorized security they were responsible for any future loss traceable to that first error. (*Fyler* v. *Fyler*, 3 Beav. 550; *Fry* v. *Tapson*, 28 Ch. D. 268; *Smethurst* v. *Hastings*, 30 Ch. D. 490.)

Indemnity for breach of trust.

6.—(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act.

Although a married woman by concurring with her trustees in a breach of trust, which resulted in the loss of a fund settled to her separate use, could not call on the trustees to replace it (*Crosby* v. *Church*, 3 Beav. 485; *Brewer* v. *Swirles*, 2 Sm. & G. 219), this was not so if she was restrained from anticipation. (*Davies* v. *Hodgson*, 25 Beav. 186.)

It has been held in Ireland that where property was held upon a contingency, which had not happened, upon trust for the separate use of a married woman, and the trustee committed a breach of trust at the wife's instigation, she was nevertheless entitled to the whole fund upon the happening of the contingency. (*Mara* v. *Manning*, 2 J. & L. 311.) This section does not appear to meet such a case.

Trustee may

7.—(1.) It shall be lawful for, but not obligatory upon,

insure buildings.

a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any *cestui que trust* upon being requested so to do.

A trustee is not liable in the event of buildings being destroyed by fire for the loss incurred by their not having been insured. (*Bailey* v. *Gould*, 4 Y. & C. 221; *Ex parte Andrews*, 2 Rose, 410; *Fry* v. *Fry*, 27 Beav. 146.)

This section enables trustees to insure without "special circumstances." (Cf. Lewin, 8th ed., p. 580.)

Statute of Limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(*a.*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of

and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

For the former law, see 3 & 4 Will. 4, c. 27, s. 25; 37 & 38 Vict. c. 57; and the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2).

Investments on mortgage of long terms.

9. A power to invest trust money in real securities shall authorize and shall be deemed to have always authorized an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.

This section removes the doubt whether long terms of years ever answered the description of "real securities."

In *Re Chennell* (8 Ch. Div. 492, p. 507), Jessel, M. R., said, "I have always understood that a leasehold security was *primâ facie*

an improper investment of trust money, and that it lay on the trustee to justify it. It would be justified if the leaseholds were held at a peppercorn rent for a long term, without covenants and without impeachment for waste—a mortgage of which was held by Vice-Chancellor Shadwell, in an unreported case, to be a proper security for trust money."

But in *Re Boyd* (14 Ch. D. 626), Jessel, M. R., expressed the opinion that, as a general rule, long terms of years did not answer the description of real securities; and this was followed by Mr. Justice Stirling in *Leigh* v. *Leigh* (W. N. 1886, p. 191).

Trustees of renewable leaseholds may renew.

10. It shall be lawful for any trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he shall in his discretion think fit, and it shall be the duty of such trustee, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same, unless the consent in writing of such person is obtained to such renewal on the part of the trustee.

This substantially re-enacts the 8th section of 23 & 24 Vict. c. 145, which was repealed by the Settled Land Act, 1882, s. 64 (45 & 46 Vict. c. 38).

(As to the duties of trustees of renewable leaseholds, see Lewin on Trusts, 8th ed., ch. xv., p. 363.)

Power to trustee to raise money

11. In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall

be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose, it shall be lawful for the trustee to raise the money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid.

to meet fines on renewal of lease.

A re-enactment of so much of the 9th section of 23 & 24 Vict. c. 145 (repealed by 45 & 46 Vict. c. 38), as relates to fines on renewals.

As to the manner in which fines are to be levied, see Lewin on Trusts, 8th ed., pp. 366 *et seq.*

12.—(1.) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.

Application of Act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

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SUPPLEMENT TO THE TRUSTEE ACTS

[Being so much of the Lunacy Act, 1890 (53 Vict. c. 5), as relates to Vesting Orders].

[WHILE the part of the Lunacy Act, 1890, which is here given makes no material alteration in the law, it consolidates the Trustee Acts of 1850 and 1852, so far as relates to the jurisdiction in Lunacy, and substitutes sections differing in order and arrangement from those of the former Acts. Power is moreover reserved to the Lord Chancellor to direct by rule in what manner application is to be made, instead of by petition. (Sect. 338, sub-sect. 3.)]

Jurisdiction of Judge in Lunacy.

108. (1.) The jurisdiction of the Judge in Lunacy under this Act shall be exercised either by the Lord Chancellor for the time being entrusted by the sign manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such Judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such Judges as aforesaid.

(*Ante*, p. 9.)

Powers to extend to British possessions.

110. The powers and authorities given by this Act to the Judge in Lunacy shall extend to property within any British possession.

Re-enacts sect. 56 of the Trustee Act, 1850 (*ante*, p. 101). By sect. 2 this Act does not apply to Scotland or Ireland "save where it is otherwise expressly provided."

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this Act the committee of the estate, under order of the Judge, exercises in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the Judge may in any such case, where it seems to him to be for the lunatic's benefit

and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees.

Re-enacts sect. 138 of the Lunacy Regulation Act, 1853 (*ante*, p. 53).

Vesting Orders.

Power to transfer stock of lunatic.

133. Where any stock is standing in the name of, or is vested in a lunatic beneficially entitled thereto, or is standing in the name of, or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof as the Judge in Lunacy directs, then the Judge may order some fit person to transfer the stock to or into the name of a new committee, or into Court or otherwise, and also to receive and pay over the dividends thereof in such manner as the judge directs.

(Lunacy Act, 1853, sect. 140.)

Stock in name of lunatic out of the jurisdiction.

134. Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the Judge thinks fit.

(Lunacy Act, 1853, sect. 141.)

Power to vest lands and release contingent right

135.—(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the Judge in Lunacy may by order vest such land in such

person or persons for such estate, and in such manner, as he directs. of lunatic trustee or mortgagee.

This re-enacts the earlier part of sect. 3 of the Trustee Act, 1850 (*ante*, p. 8). The effect of the order is given in sub-sect. (3), *infra*.

(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the Judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the Judge directs.

This re-enacts sect. 4 of the Trustee Act, 1850 (*ante*, p. 11), in connection with the following sub-section.

(3.) An order under sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

This re-enacts the latter part of sects. 3 and 4 of the Trustee Act, 1850 (*ante*, pp. 8 and 12).

(4.) In all cases where an order can be made under this section, the Judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2).

This re-enacts so much of sect. 20 of the Trustee Act, 1850 (*ante*, p. 30), as deals with the jurisdiction in Lunacy to appoint a person to convey or release instead of making a vesting order.

(5.) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place

an appointment is made were free from disability and had executed and done such assurances and things.

Sub-sects. (5) and (6) re-enact sect. 28 of the Trustee Act, 1850 (*ante*, p. 41), so far as it relates to jurisdiction in Lunacy.

Power to vest right to transfer stock and sue for chose in action.

136.—(1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

Re-enactment of sect. 5 of the Trustee Act, 1850 (*ante*, p. 12).

(3.) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

Re-enacts sect. 6 of the Trustee Act, 1850 (*ante*, p. 13).

(4.) In all cases where an order can be made under this section, the Judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

Re-enacts part of sect. 20 of the Trustee Act, 1850 (*ante*, p. 30).

(5.) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6.) After notice in writing of an order under this section, it shall not be lawful for the bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

Consolidates the Trustee Act, 1850, s. 26 (*ante*, p. 40), and the Trustee Extension Act, 1852, s. 6 (*ante*, p. 111), so far as relates to the jurisdiction in Lunacy.

Person to be appointed to transfer.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the bank, or the company or society whose stock is to be transferred.

Lunacy Regulation Act, 1853, s. 142.

Charity trustees.

138. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Re-enacts sect. 45 of the Trustee Act, 1850 (*ante*, p. 83).

Declarations and directions.

139. The Judge in Lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

Re-enacts sect. 31 of the Trustee Act, 1850 (*ante*, p. 50), so far as relates to the jurisdiction in Lunacy.

Order to be conclusive evidence of allegation on which it is founded.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any Court upon any question as to the validity of the order, but this section shall not prevent a Judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or

right to pay any costs occasioned by the order when the same appears to have been improperly obtained.

Re-enacts so much of sect. 44 of the Trustee Act, 1850 (*ante*, p. 82), as relates to the jurisdiction in Lunacy.

Power to appoint new trustees.

141. In every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

Re-enacts sect. 10 of the Trustee Extension Act, 1852 (*ante*, p. 114).

Costs.

142. The Judge in Lunacy may order the costs of and incident to obtaining an order under the provisions of this Act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the Judge may think fit.

Re-enacts sect. 51 of the Trustee Act, 1850 (*ante*, p. 87), so far as relates to the jurisdiction in Lunacy.

Saving of power of High Court.

143. The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

Declaratory of the law as previously laid down in *Re Arrowsmith* (*ante* p. 15).

Indemnity to bank and others.

333. This Act, and every order purporting to be made under this Act, shall be a full indemnity and discharge to the bank and every other company and society and their respective officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto, or pursuant to the rules under this Act, so far as relates to any property in which a lunatic is interested either in his own right, or as trustee or mortgagee, and it shall not be necessary to inquire into the propriety of any order purporting to be made under this Act relating to any such property or the jurisdiction to make the same.

Re-enacts sect. 7 of the Trustee Extension Act, 1852 (*ante*, p. 112), so far as relates to the jurisdiction in Lunacy.

Definitions affecting sections set out.

341. In this Act, if not inconsistent with the context—

"The Bank" means the governor and company of the Bank of England:

"Contingent right," as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

Taken from Trustee Act, 1850, s. 2 (*ante*, p. 3).

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands: 3 & 4 Will. 4, c. 74.

(*Ante*, p. 4.)

"Dividends" includes interest and other annual produce:

"Land" includes an undivided share of land:

Less lengthy than the definition in the Trustee Act, 1850 (*ante*, p. 2), owing to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

"Lease" includes underlease:

"Lunatic" means an idiot or person of unsound mind:

It is to be presumed that this includes a person of unsound mind not so found by inquisition.

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth:

(*Ante*, p. 8.)

"Paymaster-general" includes the assistant paymaster-general for Supreme Court business:

"Property" includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest, and any undivided share therein:

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by

instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854:

17 & 18 Vict. c. 104.

(*Ante*, p. 2.)

"Transfer" includes assignment, payment, and other disposition, and the execution, and performance, of every assurance and act to complete a transfer:

This varies in form from the definition in the Trustee Act (*ante*, p. 5), but has apparently the same effect.

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

(*Ante*, p. 5.)

Repeal.

342. The Acts mentioned in the Fifth Schedule are hereby repealed to the extent set forth in the third column of the same schedule.

Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured, by or under any enactment repealed by this Act.

THE FIFTH SCHEDULE.

	Title or Short Title.	Extent of Repeal.
13 & 14 Vict. c. 60.	The Trustee Act, 1850.	Sections three, four, five, six, and fifty-six. Sections twenty, twenty-six, twenty-seven, twenty-eight, thirty-one, forty, forty-one, forty-two, forty-four, forty-five, fifty-one, fifty-two, and fifty-three, so far as they relate to "the Lord Chancellor entrusted as aforesaid." Except so far as the above sections relate to Ireland.
15 & 16 Vict. c. 55.	An Act to extend the provisions of the Trustee Act, 1850.	Sections six and seven, so far as relates to the Lord Chancellor entrusted as aforesaid, and sections ten and eleven. Except so far as the above sections relate to Ireland.

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